Docket for 02-1371

No. 02-1371	Status: GRANTED
Title:	Missouri, Petitioner
	v.
	Patrice Seibert
Docketed:	March 19, 2003
Lower Ct:	Supreme Court of Missouri
Case Nos.:	(SC84315)
Decision Date:	December 10, 2002
Rehearing Denied:	March 19, 2003

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Mar 10 2003	Petition for writ of certiorari filed. (Response due April 18, 2003)
Apr 18 2003	Brief of respondent Patrice Seibert in opposition filed.
Apr 18 2003	Motion for leave to proceed in forma pauperis filed by respondent Patrice Seibert.
May 2 2003	Reply of petitioner Missouri filed.
May 19 2003	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
May 19 2003	Petition GRANTED.
Jun 25 2003	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including August 4, 2003.
Aug 4 2003	Joint appendix filed.
Aug 4 2003	Brief of petitioner Missouri filed.
Aug 4 2003	Brief amicus curiae of United States filed.
Aug 14 2003	Extension of time within which to file respondent's brief on the merits to and including October 8, 2003.
Sep 25 2003	SET FOR ARGUMENT Tuesday, December 9, 2003.
Oct 3 2003	CIRCULATED.
Oct 8 2003	Brief of respondent Patrice Seibert filed. (Distributed)
Oct 8 2003	Brief amici curiae of Former Prosecutors, et al. filed. (Distributed)
Oct 8 2003	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Oct 16 2003	Record received from the Supreme Court of Missouri. (1 box)
Oct 16 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 3 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 7 2003	Reply of petitioner Missouri filed. (Distributed)
Nov 14 2003	Letter of respondent proposing a lodging.

Supreme Court, U.S.
FILED

021371 MAR 10 2003

OFFICE OF THE CLERK

No.

In the
SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,
Petitioner,

v.

PATRICE SEIBERT,
Respondent.

On Petition for Writ of Certiorari
to the Missouri Supreme Court

PETITION FOR WRIT OF CERTIORARI

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
JAMES R. LAYTON
State Solicitor
Counsel of Record
SHAUN MACKELPRANG
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-0774
Counsel for Petitioner

57 pp

QUESTION PRESENTED

Is the rule "that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings," *Oregon v. Elstad*, 470 U.S. 298, 318 (1985), abrogated when the initial failure to give the *Miranda* warnings was intentional?

PARTIES TO THE PROCEEDING

Petitioner, the state of Missouri, was the respondent below. Respondent, Patrice Seibert, was the appellant below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

INTRODUCTION AND STATEMENT 2

REASONS FOR GRANTING THE WRIT 7

I. *Miranda* and its progeny create clear and consistent constitutional guidelines, which include the holding in *Elstad* that a suspect's uncoerced responses to pre-*Miranda*-warning questioning do not preclude the introduction of later, post-warning answers. 7

II. The appellate courts have reached conflicting decisions – and thus have given law enforcement officers and trial courts conflicting instructions – regarding whether there is an "intent" exception to the rule in *Elstad*. 9

III. The confusion caused by the divide cannot be resolved by resort to *Elstad*, in which this Court turned away from evaluating subjective intent, focusing instead on objective facts of coercion. 13

IV. By eroding the value of the *Elstad* rule as a "concrete constitutional guideline for law enforcement agencies and courts to follow," the divide among the courts will sow confusion and inequity throughout the country 16

CONCLUSION 19

APPENDIX 20

TABLE OF CONTENTS 21

TABLE OF AUTHORITIES

CASES **Page**

Beckwith v. United States, 425 U.S. 341 (1976) 15

Berkemer v. McCarty, 468 U.S. 420 (1984) 14

Dickerson v. United States, 530 U.S. 428 (2000) 2, 7-9

Fare v. Michael C., 442 U.S. 707 (1979) 7

Harris v. New York, 401 U.S. 222 (1971) 3, 4

Michigan v. Tucker, 417 U.S. 433 (1974) 4, 17

Miranda v. Arizona, 384 U.S. 436 (1966) . . . . . *passim*

Oregon v. Elstad, 470 U.S. 298 (1985) . . . . . *passim*

Rhode Island v. Innis, 446 U.S. 291 (1980) 7, 15

Stansbury v. California, 511 U.S. 318 (1994) 14

State v. Elstad, 658 P.2d 552 (Ore. Ct. App. 1983) 14

United States v. Carter, 884 F.2d 368 (8th Cir. 1989) . 10-13

United States v. DeSumma, 272 F.3d 176 (3rd Cir 2001) . . 8

United States v. Esquilin, 208 F.3d 315 (1st Cir. 2000) . . 10-12

United States v. Faulkingham, 295 F.3d 85 (1st Cir. 2002) . 8

United States v. Gale, 952 F.2d 1412 (D.C. Cir. 1992) . . . 11

United States v. Gupta, 183 F.3d 615 (7th Cir. 1999) 12

United States v. Orso, 266 F.3d 1030 (9th Cir. en banc 2001) 10, 13, 18

United States v. Orso, 275 F.3d 1190 (9th Cir. 2001) 8

United States v. Patane, 304 F.3d 1013 (10th Cir. 2002) ... 8

United States v. Sterling, 283 F.3d 216 (4th Cir. 2002) 8

United States v. Wiley, 997 F.2d 378 (8th Cir. 1993) 12

Whren v. United States, 517 U.S. 806 (1996) 15

CONSTITUTIONAL AND STATUTORY AUTHORITY

28 U.S.C. § 1254(1) 2

Constitution of the United States, Amendment V 2

SCHOLARLY AUTHORITIES

Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397 (1999) 3

No. _____

In the
SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,

Petitioner,

v.

PATRICE SEIBERT,

Respondent.

On Petition for Writ of Certiorari to the Missouri Supreme Court

---

PETITION FOR WRIT OF CERTIORARI

The State of Missouri respectfully petitions for a writ of certiorari to review the judgment of the Missouri Supreme Court in this case.

OPINIONS BELOW

The opinion of the Missouri Supreme Court reversing the trial court's judgment and sentence, filed December 10. 2002, and reported at 93 S.W.3d 700 (Mo. banc 2002), is reprinted in the Appendix at A1-A26 ("App.").

JURISDICTION

The Missouri Supreme Court entered its judgment on December 10, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> No person . . . snall be compelled in any criminal case to be a witness against himself . . . .

INTRODUCTION AND STATEMENT

This case seeks to clarify whether the bright-line rule established in *Oregon v. Elstad*, 470 U.S. 298 (1985), "that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings." is applicable in cases where the initial failure to advise the suspect of his *Miranda* rights was intentional.

Ever since this Court held in *Miranda v. Arizona*, 384 U.S. 436 (1966), that certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted into evidence, there has been an ongoing debate over the application of that rule. In its most recent contribution to that debate, this Court clarified that *Miranda* was a "constitutional decision" of the Court, and that it could not be overruled by an act of Congress. *Dickerson v. United States*, 530 U.S. 428, 432 (2000).

While this Court has adhered to the core holding of *Miranda*, this Court has simultaneously limited its impact in various circumstances. For example, in *Harris v. New York*, 401 U.S. 222 (1971), this Court held that while voluntary statements taken in violation of *Miranda* must be excluded from the prosecution's case in chief, the presumption of coercion mandated by the bright-line rule of *Miranda* does not bar the use of such statements for impeachment purposes on cross-examination.

Directly pertinent here is another limit on the exclusionary rule of *Miranda*: the holding in *Oregon v. Elstad*. There, this Court held that an initial failure of law enforcement officers to administer the *Miranda* warnings, without more, did not "taint" (and render inadmissible) admissions made after the suspect had later been fully advised of and had waived his *Miranda* rights. 470 U.S. at 318. In other words, the "fruit of the poisonous tree" doctrine, developed in Fourth Amendment jurisprudence, did not apply to the same extent to the Fifth Amendment rights protected by *Miranda*. 470 U.S. at 305-307.

Not surprisingly, *Elstad* and other decisions interpreting *Miranda* have had an impact on law enforcement practices across the nation. And, while law enforcement officers have generally come to terms with the need to administer *Miranda* warnings, various techniques have been developed to overcome the perceived "obstacles" created by *Miranda*. One strategy, which can yield various types of fruit, is to question suspects "outside *Miranda*." *See* Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397 (1999).

The reason for questioning suspects "outside *Miranda*" is simple: rather than allowing suspects to terminate non-coercive interviews by invoking their rights, law enforcement officers have recognized that, while not admissible at trial, such non-coerced statements can lead to beneficial, and admissible,

derivative evidence. *See e.g. Michigan v. Tucker*, 417 U.S. 433 (1974) (testimony of a witness whose identity was discovered as the result of an otherwise voluntary statement taken from the accused without the benefit of full *Miranda* warnings was not excluded as fruit of the poisonous tree). Alternatively, even if not admissible in the state's case in chief, under *Harris* such voluntary statements taken in violation of *Miranda* can nevertheless be used for impeachment in the event that the suspect later testifies at trial.

Relying on this Court's holding in *Elstad*, some law enforcement officers use an interrogation strategy designed to obtain information in two stages: first, the suspect is questioned without being advised of his *Miranda* rights; and second, once an admission has been obtained (i.e., once the "cat is out of the bag"), the suspect is carefully advised of his *Miranda* rights and questioned again. Then, at trial, only the second confession (if one is obtained) is used against the accused. This technique roughly approximates what occurred in *Elstad*.

And it is the technique that troubled the Missouri Supreme Court here, where respondent was convicted of murder in the second degree for her role in arranging to burn down her mobile home, with a man inside, to cover up the death of her son (who had apparently died of neglect for which respondent might have been blamed). App. at A2.

Five days after the fire, respondent was arrested and taken to the police station, where she was placed in an interview room. App. at A3. A few minutes later, she was subjected to custodial interrogation without being given the *Miranda* warnings. App at A3. During the 40-minute interview, she made incriminating statements about her involvement in the murder. App. at A3.

After a fifteen- to twenty-minute break, the respondent was carefully advised of her *Miranda* rights. App at A3. She indicated that she understood her rights, she signed a waiver form, and she indicated that she wanted to talk to the police. App. at A3. Then she again made incriminating statements. App. at A3-A4.

At a pre-trial suppression hearing, the interviewing officer candidly admitted that he had used a two-stage interrogation technique to obtain respondent's confession. App. at A4-A5. He further testified that he had been trained at a "national" institute to use such a technique. App. at A4. Respondent did not testify at the suppression hearing, and her efforts to have the second, warned confession suppressed were unsuccessful. App. at A4-A5.

On appeal, while recognizing that the initial confession had not been actually coerced in the traditional sense, respondent argued that the second confession nevertheless should have been suppressed as "fruit of the poisonous tree" because the officer had intentionally withheld the *Miranda* warnings. *See* App. at A1, A6-A7.[1] Respondent thus argued, despite the rule in *Elstad*, that the "fruit of the poisonous tree" doctrine should apply in the *Miranda* context in those instances where an officer intentionally does what the officer in *Elstad* did, *i.e.*,

---

[1] The Missouri court did not expressly outline respondent's claim in its opinion; rather, it simply identified the question that respondent's claim posed: "whether a law enforcement officer's intentional violation of *Miranda* . . . in obtaining a statement requires suppression of a second statement, secured after a *Miranda* warning was given, where the second statement was based on the first." App. at A1. That respondent's first statement was not actually coerced in the traditional sense was revealed by the Missouri court's identifying it as carrying a "presumption" of coercion arising out of the initial failure to advise respondent of her *Miranda* rights. App. at A1.

begins questioning before giving the *Miranda* warnings. *See* App. at A1, A6-A7.

A four-judge majority of the Missouri Supreme Court agreed with respondent and applied the "fruit of the poisonous tree" doctrine. App. at A7-A9. The majority said that there was "no intentional violation of *Miranda* in *Elstad*," and held that intentionally deferring the *Miranda* warnings removed this case from the *Elstad* rule. App. at A7-A9. The majority then concluded, based upon the connection between the two confessions in time, place, and content, that the "taint" from the absence of *Miranda* warnings had not dissipated prior to respondent's second confession. App. at A9-A13.

Three judges dissented, pointing directly to *Elstad*. App. at A15. The dissent would apply the *Elstad* holding as this Court wrote it, declining to create an exception based upon the subjective intent of the questioning officer. App. at A15-A21. That difference of opinion reflects a conflict among the courts on that very question of such an exception – a conflict that reduces to rubble one of the "concrete constitutional guidelines" developed in *Elstad*, that this Court had given "law enforcement agencies and courts to follow." *Miranda v. Arizona*, 384 U.S. at 441-442.

REASONS FOR GRANTING THE WRIT

I. *Miranda* and its progeny create clear and consistent constitutional guidelines, which include the holding in *Elstad* that a suspect's uncoerced responses to pre-*Miranda*-warning questioning do not preclude the introduction of later, post-warning answers.

The rule in *Miranda v. Arizona* serves a constitutional purpose, *see Dickerson v. United States*, 530 U.S. 428 (2000), and provides a bright-line rule governing the admissibility of confessions. In *Dickerson*, this Court reviewed its *Miranda* jurisprudence, noting that in *Miranda* itself. the Court had sought "'concrete constitutional guidelines for law enforcement agencies and courts to follow.'" *Id.* at 435, quoting *Miranda*, 384 U.S. at 442. It is the specificity of the *Miranda* rule that makes it workable in the practical world of law enforcement:

> Miranda's holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity . . . benefits the accused and the State alike . . . .

Fare v. Michael C., 442 U.S. 707, 718 (1979).

Chief Justice Burger warned against holdings that might defeat the court's success in creating a specific rule that is "reasonably clear" and accessible to law enforcement officers. *Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring). He decried the "introduc[tion of] new elements of uncertainty." *Id.*

This Court has heeded that warning and refused to return to alternatives that would be "more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a

consistent manner." *Dickerson*, 530 U.S. at 444. At least until the dispute that brings us here, the Court has succeeded in retaining "concrete constitutional guidelines." But the *Miranda* bulwark, though "concrete," is not entirely straight. Among the "concrete" guidelines are "several exceptions to *Miranda's* warnings requirement." *Id.* at 437. And among the precedents this Court cited in *Dickerson* as an "exception" was *Oregon v. Elstad*, 470 U.S. 298 (1985).[2] *Id.* at 441.

In *Elstad*, the Court rejected efforts to import the Fourth Amendment "fruit of the poisonous tree" doctrine wholesale into *Miranda's* Fifth Amendment context. The Court held "that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda

---

[2] Various courts have addressed whether *Elstad* survived this Court's decision in *Dickerson* – a question that is necessarily a prerequisite to the one posed in this petition. But, relying upon the discussion of *Elstad* in *Dickerson*, those courts have consistently held that *Elstad* did survive. *See United States v. Faulkingham*, 295 F.3d 85 (1st Cir. 2002) (concluding that *Elstad* survived, but questioning the scope of its application to different kinds of derivative evidence and ultimately deciding that derivative physical evidence will not be excluded when the *Miranda* violation was negligent) (petition for certiorari filed October 7, 2002); *United States v. DeSumma*, 272 F.3d 176 (3rd Cir. 2001), *cert. denied*, 535 U.S. 1028 (2002) (concluding that *Elstad* survived, and holding that the "fruits" doctrine would not operate to exclude derivative physical evidence); *United States v. Sterling*, 283 F.3d 216 (4th Cir. 2002), *cert. denied*, 122 S.Ct. 2606 (2002) (concluding that *Elstad* survived, and holding that the "fruits" doctrine would not operate to exclude derivative physical evidence); *United States v. Orso*, 275 F.3d 1190 (9th Cir. 2001), *cert. denied*, 123 S.Ct. 125 (2002) (stating that *Elstad* is still good law, and concluding that a second, warned confession is admissible after a *Miranda* violation) (O'Scannlain, J. concurring in the denial of full court en banc rehearing); *United States v. Patane*, 304 F.3d 1013 (10th Cir. 2002) (concluding that *Elstad* survived in a "fundamentally altered" landscape, but concluding that derivative physical evidence must be excluded if it is obtained after a *Miranda* violation) (petition for certiorari filed February 12, 2003).

warnings." 470 U.S. at 318. Thus, by the time this Court observed in *Dickerson* that "*Miranda* has become embedded in routine police practice," 530 U.S. at 443, the *Elstad* holding was an integral part of the *Miranda* package.

"Routine police practice" has thus been developed on the premise that, as held in *Elstad*, pre-*Miranda* questioning does not preclude the use of later admissions unless the initial questioning was both unwarned and actually coerced. And it has been developed on the premise that whether the initial questioning was unwarned and actually coerced is judged by objective facts, not by subjective intent. That is, like the application of the core holding in *Miranda*, the application of *Elstad* can be judged by a court based entirely upon the circumstances of the questioning, without exploring the vagaries of subjective intent. Law enforcement personnel thus have developed "routine police procedures" that avoid actual coercion – not procedures governed by the fleeting uncertainties of subjective intent.

II. The appellate courts have reached conflicting decisions – and thus have given law enforcement officers and trial courts conflicting instructions – regarding whether there is an "intent" exception to the rule in *Elstad*.

Until recently, *Elstad* appeared to define a specific limit to the application of *Miranda*'s "concrete" exclusionary wall. The decision of the Missouri Supreme Court demonstrates that *Miranda*'s wall is breaking up at the *Elstad* point. But the Missouri court did not strike the first blow. The damage began earlier, with a split among federal circuit courts which arose when the circuits analyzed *Elstad* in light of the interrogating officer's subjective intent. If this breach is not repaired, the "concrete" guidelines in the *Elstad* portion of the *Miranda* wall will be reduced to rubble.

The Missouri Supreme Court majority relied upon analysis from *United States v. Carter*, 884 F.2d 368, 373 (8th Cir. 1989). There, the Eighth Circuit opined that *Elstad* did not give law enforcement officers a "green light" to withhold *Miranda* warnings until "such time as they are able to secure a confession."[3] But that dicta and the Missouri Supreme Court's holding cannot be reconciled with holdings of the First and Ninth Circuits that confessions obtained by the use of such so-called "improper tactics" are admissible under *Elstad*. *United States v. Esquilin*, 208 F.3d 315 (1st Cir. 2000); *United States v. Orso*, 266 F.3d 1030 (9th Cir. en banc 2001), *cert. denied*, 123 S.Ct. 125 (2002).

In *United States v. Carter*, the defendant was subjected to custodial interrogation for an hour and a half. 884 F.2d at 369. After about fifty-five minutes, the investigators told the defendant they were looking for some missing currency and asked if they could look in his wallet. *Id.* Upon finding the missing items, the investigators continued to question the defendant, and they obtained incriminating statements. *Id.* The investi-gators then informed the defendant of his rights, and, after waiving those rights, the defendant gave a written statement. *Id.* The defendant's statements were suppressed by the trial court, and the government appealed.

The Eighth Circuit, after determining that the defendant had been subjected to custodial interrogation, turned to an analysis of *Elstad*. The court noted that in *Elstad* this Court was confronted with a "technical violation of *Miranda*" that may have arisen from "errors by the police in determining when a suspect is in custody or has had his freedom of movement significantly restrained." *Id.* at 373. Accordingly, after pointing out the

[3] The opinion in *United States v. Carter* was also divided, with the dissent stating that the second confession was admissible under *Oregon v. Elstad*.

apparently intentional failure to advise Carter of his rights and the "continuous" nature of the interrogation process, the court distinguished the case from *Elstad* and stated that the *Elstad* opinion "gave no indication that it intended to give a green light to law enforcement officers to ignore the require-ments of *Miranda* until after such time as they are able to secure a confession." *Id.* And, to support that conclusion, the Eighth Circuit pointed out that the *Elstad* opinion

> expressly rejected Justice Brennan's "apocalyptic" dissenting remonstrations that the Court's holding dealt a "crippling blow" to *Miranda* by permitting the police to withhold warnings until the end of interrogation, and abjured what it viewed as Justice Brennan's invitation to trial courts and prosecutors to distort the reasoning and holding of the Court's opinion.

Id. at 373-374.

The District of Columbia Circuit seems to have joined the Eighth Circuit on the side of the Missouri Supreme Court majority. In *United States v. Gale*, 952 F.2d 1412 (D.C. Cir. 1992), when confronted with a defendant who claimed that his case was controlled by the *Elstad* analysis of *Carter*, the court reiterated the salient portions of the *Carter* analysis and stated that the defendant's case was "clearly distinguishable." *Id.* at 1417-1418. The court explained that the facts of the defendant's case were largely consistent with the facts of *Elstad*, and it found "no evidence . . . of a deliberate 'end run' around *Miranda*[.]" *Id.* at 1418.

Contrariwise, the First Circuit has held that "a subjective intent by the officer to violate *Miranda*, unaccompanied by any coercive *conduct* cannot in itself undermine the suspect's free will." *United States v. Esquilin*, 208 F.3d at 321 (emphasis in original). In *Esquilin*, law enforcement officers arrested the defendant after they found a controlled substance in his motel room (which the defendant identified upon questioning). *Id.* at

317. The arresting officer did not advise the defendants of his *Miranda* rights; when another officer arrived to take over the investigation, the arresting officer told the new officer that the defendant had not been advised of his rights. *Id.* The new officer did not advise the defendant of his rights, and he questioned the defendant and obtained incriminating statements. *Id.* At that point, the officer advised the defendant of his rights, and the defendant made a detailed confession. *Id.* Only the defendant's post-*Miranda* confession was admitted at trial. *Id.* at 318-319.

On appeal, the court held that the post-*Miranda* statement was properly admitted under *Elstad*. *Id.* The court rejected the defendant's claim that the continuous nature of his interrogation distinguished his case from *Elstad*, pointing out that "[a]ccording to *Elstad*, the lapse of time between interrogations is relevant only when the statement obtained in violation of *Miranda* was actually coerced." *Id.*[4] The court further held that an officer's subjective intent to purposely violate *Miranda* is not an "improper tactic" (because it is not actually coercive) and that the officer's subjective intent did not alter the *Elstad* analysis (because *Elstad* held that failure to advise does not, without more, make a confession involuntary). *Id.* at 319-321. And, finally, the court rejected the defendant's argument that it should follow the Eighth Circuit's holding in *Carter* because it needed to deter such interrogation tactics, instead affirming *Elstad*'s conclusion that *Miranda*'s deterrence rationale requires no more than the suppression of any pre-*Miranda* confession.[5]

---

[4] The Seventh Circuit has also held that the temporal proximity between the unwarned and warned confessions is irrelevant under *Elstad*. *See United States v. Gupta*, 183 F.3d 615, 618-619 (7th Cir. 1999).

[5] In *Esquilin*, the court noted that the analysis of *Elstad* in *Carter* appeared to be dicta, and that a portion of it was facially inconsistent with *Elstad*. *United States v. Esquilin*, 208 F.3d at 320. *See also United States v. Wiley*, 997 F.2d 378, 383 (8th Cir. 1993) (noting that *Carter*'s holding ultimately turned upon an illegal search and not its analysis of *Elstad*).

In this conclusion, the First Circuit is joined by the Ninth. In *United States v. Orso*, the defendant had been arrested and, without the benefit of *Miranda* warnings, subjected to custodial interrogation while being transported to the police station. About ten minutes after making incriminating statements, inspectors advised the defendant of her rights, and she fully confessed. *Id.* at 1033. The Ninth Circuit rejected the "improper tactic" argument and the heightened deterrence argument, and overturned a decision in which it had reached a contrary conclusion. *Id.* at 1034-1039.

Thus, in the wake of *Elstad*, courts have reached opposite results when confronted with deliberate, pre-*Miranda*-warning questioning. Only this Court can eliminate that division.

III. The confusion caused by the divide cannot be resolved by resort to *Elstad*, in which this Court turned away from evaluating subjective intent, focusing instead on objective facts of coercion.

This Court did not provide enough in *Elstad* itself from which to derive a clear answer to the courts' disagreements – or at least not to derive the Missouri Supreme Court's answer. Again, this Court held in *Elstad* "that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings." 470 U.S. at 318. In this case, the Missouri court did not find that respondent was subjected to actually coercive questioning prior to receiving the *Miranda* warnings. Rather, the Missouri court found that (1) the interrogating officer intentionally withheld

Miranda warnings to obtain the first confession, and (2) the interrogating officer, as part of a continuous process, used the first admission to prompt the later, warned confessions. App. at A7-A13. Relying upon those facts, the court attempted to distinguish this case from *Elstad*. *Id.* But *Elstad* cannot be distinguished on those facts.

The Missouri Supreme Court majority noted that "*Elstad* dealt with what the Court described as 'a simple failure to administer the warnings.'" App. at A7. The court further asserted that "[t]here was no intentional violation of *Miranda* in *Elstad*[.]" App. at A7. On that basis, the Missouri court distinguished this case from *Elstad* and "presume[d] the violation of *Miranda* was a tactic . . . used to weaken [respondent's] ability to knowingly and voluntarily exercise her constitutional rights." App. at A12. But nothing in *Elstad*, or in the decision this Court was reviewing, *State v. Elstad*, 658 P.2d 552 (Ore. Ct. App. 1983), supports the premise that there the failure to issue *Miranda* warnings to Elstad was inadvertent – or the converse, that the failure was intentional.

Though this Court speculated in *Elstad* as to why the officer did not initially give the *Miranda* warnings, this Court ultimately turned to the objective facts: "Whatever the reason for [the officer's] oversight, the incident had none of the earmarks of coercion." *Elstad*, 470 U.S. at 315-316. Avoiding further inquiry into the subjective intent of the officer was consistent with a long line of *Miranda* decisions by this Court resisting the urge to engage in exploration of subjective intent.[6] And

[6] *See Stansbury v. California*, 511 U.S. 318, 323-325 (1994) (an officer's undisclosed, subjective beliefs have no bearing upon *Miranda*'s objective in-custody determination); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (for purposes of *Miranda*, "[a] policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."); *Rhode Island v. Innis*, 446 U.S. at 300-302 ("the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response." regardless of the "underlying intent of the police"); *Beckwith v. United States*, 425 U.S. 341, 346-347 (1976) (the fact that a suspect is the "focus" of a law enforcement investigation when questioned does not, in itself, transform questioning into custodial interrogation). *See also Whren v. United States*, 517 U.S. 806, 813 (1996) ("'the fact that [an] officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.' . . . Subjective intentions play no role in ordinary, probable cause Fourth Amendment analysis.").

avoiding such an inquiry made logical sense. As this Court emphasized in *Elstad*, *Miranda* is a Fifth Amendment protection designed to eliminate compelled self-incrimination, *id.* at 306-307; and, consequently, the allegedly coercive effect of questioning people without having advised them of their rights is the same regardless of whether the failure to advise was intentional or inadvertent.

The majority of the Missouri Supreme Court also relied on the fact that respondent's first confession (which the court labeled the "breakthrough" or "beachhead" admission) was used to prompt the second, warned confession. App. at A5, A7-A8. But again, *Elstad* is not on point. There, the Court merely noted that the officers did not "exploit the unwarned admission to pressure respondent into *waiving* his right to remain silent." *Elstad*, 470 U.S. at 316 (emphasis added). That observation cannot mean that officers in possession of a suspect's "guilty secret" are foreclosed from mentioning that "secret" during subsequent interrogation, where the suspect is advised of and – without "pressure" – waives his rights.

This Court specifically rejected the "cat out of the bag" argument that "voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver." *Id.* at 312. The Court thus showed, to use another metaphor, that officers are not prohibited from mentioning the "elephant in the middle of the room," so long as they do not pressure the suspect to induce a *waiver* of his *Miranda* rights. But that does not provide a bridge across the divide among the courts on the impact of an officer's subjective intent – whether he learned of the "elephant" deliberately or inadvertently – when considering the admission of statements made after the *Miranda* warnings.

IV. By eroding the value of the *Elstad* rule as a "concrete constitutional guideline for law enforcement agencies and courts to follow," the divide among the courts will sow confusion and inequity throughout the country.

The result of the divide between the Missouri/Eighth Circuit rule and the First/Ninth Circuit rule is both inequity and confusion. Suspects in the First and Ninth Circuits can avoid having to face their post-*Miranda*-warning statements at trial only if they can show that the objective circumstances of the pre-*Miranda*-warning questioning were coercive. Suspects in Missouri, and perhaps in the Eighth and D.C. Circuits, can prevent the introduction of their post-*Miranda*-warning statements at trial even if the objective circumstances of the pre-*Miranda*-warning questioning were *not* coercive, provided they can persuade the trial court that the officer's subjective intent was improper. Suspects in other states and circuits have no idea what the current rule is.

Neither, of course, do law enforcement officers. And law enforcement officers recognize the value of questioning

suspects "outside *Miranda*." They know that such strategies are likely to yield other types of fruit that can both further an investigation and be used at trial.[7] Thus many law enforcement officers, absent concrete, consistent, constitutional guidance, will continue to push the limits of *Miranda* and *Elstad*. Those attempts will raise, throughout the country, the issue on which the courts are so clearly divided.

That result is assured not just because it is logical to use the approach used here, but because there are already nationwide efforts to encourage officers to do so. The officer in this case testified that a "national" institute had trained him to use the two-stage interrogation technique that elicited respondent's confession. This Court can be assured that other officers are receiving the same kind of training.[8] A website for the

---

[7] Even the Missouri Supreme Court acknowledged that there were possible benefits to be gained by questioning suspects "outside *Miranda*" when it stated that the risk of exclusion under *Miranda* "may be weighed against the desirability of getting information, such as the names of witnesses or location of physical evidence." App. at A8-A9. Thus, it appears that the Missouri court is not yet questioning the validity of *Michigan v. Tucker*, 417 U.S. 433 (1974).

[8] The officer may have been referring to the Reid Institute when he testified that he had been trained at a "National Law Police Institute." The Reid Institute conducts training seminars throughout the nation and licenses its interrogation techniques to other training organizations. *See* www.reid.com (available March 4, 2003) and www.w-z.com (the website for Wicklander-Zulawski and Associates, Inc., a company that offers training in the Reid interrogation techniques) (available March 4, 2003). Though not clearly an example of a two-stage interrogation technique, the following testimonial from the Wicklander-Zulawski website suggests that the two-stage interrogation technique is being taught:

> Once on the property, I did apprehend the subject, who of course denied the crime. I used some theories already learned in the class on Thursday, and directly put them to use. Within ten minutes, I had a full verbal confession, *followed by a secured* written confession. Again this type of incident is rare at my property, and

Behavior Analysis Training Institute, which trains officers in interrogation techniques, has a "Legal" webpage that discusses cases bearing upon interrogation strategies. The Institute briefly outlines the Ninth Circuit's decision in *United States v. Orso*, followed by this telling comment:

> Proper [sic] conducted attenuation principles are alive and well (*Oregon v. Elstad*, U.S., 1985). A first unwarned statement can be rehabilitated at a later time by a second, attenuated statement. In *Elstad* there was a two hour break between the first, unwarned statement at the defendant's home and second, Mirandized statement at the police station. U.S. ruled: "When neither the initial or subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the fact-finder".

See www.liedetection.com (available March 4, 2003). Though this comment suggests a somewhat less than full understanding of *Elstad* (inasmuch as it seems to rely primarily upon a taint-and-dissipation analysis), it nevertheless teaches law enforcement officers that, when properly conducted, the practice of questioning suspects without advising them of their *Miranda* rights is "alive and well."

As such training reaches more and more law enforcement officers, the wide divide among the courts will not narrow, and the number of courts on each side of the divide will increase. Meanwhile, suspects, law enforcement officers, and courts will struggle with the choice the conflicting decisions pose. Someone will be unduly disadvantaged – either the suspect who

---

> my General Manager was very impressed with our results. The Director of Engineering was also standing by during questioning as a witness, and she could not believe how my new learned techniques worked.

See www.w-z.com/tales_3.htm (emphasis added) (available March 4, 2003).

cannot argue intent as an element to preclude application of the *Elstad* rule, or law enforcement efforts aimed at finding and convicting criminals. This Court should grant the petition and resolve the conflict.

CONCLUSION

For these reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General
JAMES R. LAYTON
State Solicitor
Counsel of Record
SHAUN MACKELPRANG
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-0774

Counsel for Petitioner

March 10, 2003

APPENDIX

TABLE OF CONTENTS

Missouri Supreme Court's opinion
filed December 10, 2002 ..... A1-A26

A-1

STATE OF MISSOURI,
Respondent,

v.

PATRICE SEIBERT,
Appellant.

No. SC84315

SUPREME COURT OF MISSOURI

93 S.W.3d 700

December 10, 2002.

Michael A. Wolff, Judge.

The question presented here is whether a law enforcement officer's intentional violation of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), in obtaining a statement requires suppression of a second statement, secured after a *Miranda* warning was given, where the second statement was based on the first. Essential to this inquiry is whether the presumption that the first statement was involuntary carries over to the second statement. In the circumstances here, where the interrogation was nearly continuous, the Court holds that the second statement, clearly the product of the invalid first statement, should have been suppressed.

Patrice Seibert was convicted of second-degree murder for her role in the death of Donald Rector in a fire intentionally set in the mobile home where Rector resided. She was sentenced to life imprisonment. On appeal, Seibert asserts the trial court

committed reversible error when it allowed the State to introduce inculpatory statements she made while in custody. Seibert did not testify at trial.

After opinion by the Court of Appeals, Southern District, this Court granted transfer. This Court has jurisdiction. MO. CONST. art. V, section 10. The judgment of the trial court is reversed, and the case is remanded.

Facts - The Mobile Home Fire and Death of Donald Rector

Seibert lived in a mobile home in Rolla with her five sons. The victim, Donald Rector, 17, who was on medication for a mental disorder, also lived with them. Jonathan, 12, one of Seibert's sons, was seriously handicapped with cerebral palsy. He could not walk, talk or feed himself. On February 12, 1997, Jonathan died in his sleep. Seibert was afraid to report his death. He had bedsores, and she was afraid authorities would believe she had been neglecting him.

In Seibert's presence, two of her teen-aged sons and two of their friends discussed a plan to set the mobile home on fire to cover up Jonathan's death. They decided Donald should be present in the fire so it would not look as though Jonathan had been left alone. In her statements, Seibert admitted that Donald, who died in the fire, was supposed to die in the fire. According to the trial testimony of Jeremy, one of her son's friends, Seibert was crying, "pretty much in hysterics," during the discussion with her two sons and their friends. She suggested sending her two younger sons, Patrick and Shawn, to church during the fire. Seibert was not present when the fire started.

Darian, age 17, the oldest of Seibert's sons, and his friend Derrick were to set the fire. Darian testified that Derrick poured gas around the trailer and then hit Donald, who was having a seizure and convulsing on the floor. Derrick set the fire before

Darian was out of the trailer. Darian suffered serious burns to his face. Donald's dead body was found kneeling in front of and partially lying on a sofa in the west bedroom with a penetrating wound on the back of his skull. The cause of death was asphyxiation secondary to exposure to fire.

The Two-Step Interrogation

On February 17, 1997, five days after the trailer fire, St. Louis County officer Kevin Clinton woke Seibert at 3:00 a.m. She was at a hospital in St. Louis County, where Darian was being treated for burns. Rolla officer Richard Hanrahan arranged for Officer Clinton to arrest Seibert. Officer Hanrahan specifically instructed Officer Clinton not to advise Seibert of her *Miranda* rights.

Once at the police station, Seibert was left in a small interview room for 15 to 20 minutes to "give her a little time to think about the situation." Without issuing a *Miranda* warning, Officer Hanrahan then questioned her for 30 to 40 minutes. He squeezed her arm and repeated the same statement, "Donald was also to die in his sleep," throughout much of the interview. After she made an admission indicating that she knew Donald was to die in his sleep, she was given a 20-minute break for coffee and a cigarette. Officer Hanrahan then resumed the interview, this time using a tape recorder, and advised Seibert of her *Miranda* rights. Seibert signed a waiver form.

Officer Hanrahan began the second stage of the interview by referring to the first stage: "Ok, 'trice, we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?" Then, with occasional reference back to the first stage, pre-*Miranda* interview, Officer Hanrahan continued to question Seibert. She repeated statements she had made prior

to receiving *Miranda*. This tape-recorded interview was played

to the jury at trial.

Officer Hanrahan testified that he made a conscious decision to withhold *Miranda* hoping to get an admission of guilt. He testified that an institute, from which he has received interrogation training, has promoted this type of interrogation "numerous times" and that his current department, as well as those he was with previously, all subscribe to this training. In the second stage of the interview, Officer Hanrahan began by reminding Seibert that they had been "talking for a little while" about the trailer fire, which occurred on February 12. Thus, he was able to link together the unwarned interview with the warned interview. Seibert was reminded of the statements she made during the first stage, which occurred before he gave Seibert a *Miranda* warning. He also used Seibert's pre-warning statements to phrase his questions. For example, consider the following excerpt from the second stage of the interview (emphasis added):

Officer Hanrahan: Now, in discussion you told us, you told us that there was an understanding about Donald. (Here, he is referring to the unwarned portion of the interview.)

Seibert: Yes.

Hanrahan: Did that take place earlier that morning [February 12, 1997]?

Seibert: Yes.

Hanrahan: Ok. And what was the understanding about Donald?

Seibert: If they could get him out of the trailer, to take him out of the trailer.

Hanrahan: And if they couldn't?

Seibert: I, I never even thought about it. I just figured they would.

Hanrahan: Trice, didn't you tell me that he was supposed to die in his sleep?

Seibert: If that would happen, 'cause he was on that new medicine, you know . . . .

Hanrahan: The Prozac? And it makes him sleepy. So he was supposed to die in his sleep?

Seibert: Yes.

Officer Hanrahan, in order to secure an admissible confession, used information he gained from Seibert's previous inadmissible confession. As a result, Seibert's post-warning statements were closely tied to the lengthy unwarned interrogation.

The Purpose and Protections of *Miranda*

To preserve the Fifth Amendment right against self incrimination where an accused is subjected to custodial interrogation, which "exacts a heavy toll on individual liberty and trades on the weakness of individuals," the United States Supreme Court created the now well-known safeguard: the *Miranda* warning. *Miranda v. Arizona*, 384 U.S. 436, 455, 16 L. Ed. 2d 694, 86 S. Ct. 1602. *Miranda* provided that, "prior to any questioning" a person must be informed of certain rights, including the right to remain silent, which can only be waived

knowingly, voluntarily and intelligently. *Id.* at 444 (emphasis added).[1]

The *Miranda* requirement serves several purposes. "For those unaware of the privilege, the warning is needed simply to make them aware of it - the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere." 384 U.S. at 468. Beyond providing these protections, the *Miranda* decision and its progeny serve to guide police and deter improper conduct.[2] The Supreme Court granted certiorari in *Miranda* to "give concrete constitutional guidelines for law enforcement agencies and courts to follow."

Failure to give a *Miranda* warning does not result in exclusion of a statement for all purposes. An unwarned custodial statement may be used for impeachment. *Harris v. New York*, 401 U.S. 222, 28 L. Ed. 2d 1, 91 S. Ct. 643 (1971). The prosecution may use the testimony of a witness who was identified by the defendant in a statement given without a *Miranda* warning. *Michigan v. Tucker*, 417 U.S. 433, 444, 41 L. Ed. 2d 182, 94 S. Ct. 2357 (1974). And, most pertinent to this case, the Court in *Oregon v. Elstad*, 470 U.S. 298, 84 L.Ed. 2d 222, 105 S. Ct. 1285 (1985), held that a defendant's prior remark, in answer to a question during the police investigation,

---

[1] The United States Supreme Court has held that the protection is derived from the Constitution and, thus, not subject to legislative repeal and reaffirmed its applicability to the states. *Dickerson v. United States*, 530 U.S. 428, 438-39, 434, 147 L. Ed. 2d 405, 120 S. Ct. 2326 (2000).

[2] "Miranda has had a tremendously shattering impact upon all levels of the police profession and is, unquestionably, the most significant, far-reaching, and all-encompassing decision in the broad field of criminal justice ever handed down." ARTHUR S. AUBRY, JR. & RUDOLPH R. CAPUTO, CRIMINAL INTERROGATION 310 (3d ed. 1980).

does not - "without more" - make a subsequent statement inadmissible after a *Miranda* warning was given. *Elstad*, 470 U.S. at 300, 309.

As *Elstad* and *Tucker* reiterate, the goals of *Miranda* are to deter improper police conduct and to assure trustworthy evidence, specifically evidence that has not been obtained in circumstances that appear to be coercive. *Elstad* dealt with what the Court described as "a simple failure to administer the warnings." 470 U.S. at 309. There was no intentional violation of *Miranda* in *Elstad*, and the Court held "the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." *Id.*

But what about circumstances such as this case where the violation of *Miranda* was intentional? An intentional violation of *Miranda* shifts the focus from the goal of gaining trustworthy evidence - though that is still a major concern - to the goal of deterring improper police conduct.

Intentional *Miranda* Violations

The police officer in this case purposefully withheld a *Miranda* warning as part of a two-step interrogation technique designed to elicit an initial confession before reading the accused her rights, hoping that she would repeat that confession. As noted, Officer Hanrahan testified that he made a conscious decision not to advise Seibert of her rights because he was hoping to get an admission from her and specifically asked the arresting officer not to give a *Miranda* warning. Officer Hanrahan characterized the strategy as follows:

Basically, you're rolling the dice. You're doing a first stage where you understand that if you're told something that when you do read the Miranda rights, if they invoke them, you can't use what you were told. We were fully aware of that. We went

forward with the second stage, read Miranda, and she repeated the items she had told us.

Securing a first admission - no matter how small - is often called the "breakthrough" or "beachhead".[3] Interrogators are taught that procuring the first admission is the "biggest stumbling block" that, once overcome, usually leads to a full confession. "The subject must be motivated to make the first admission, no matter how apparently small or trivial," according to ARTHUR S. AUBRY, JR. & RUDOLPH R. CAPUTO, CRIMINAL INTERROGATION 290 (3d ed. 1980). "If this admission is related to the crime and to the subject matter of the interrogation, there is every reason to expect that the first admission will lead to others, and eventually to a full confession."

Once the officer has the initial admission, the officer uses "skillfully applied interrogation techniques" to "motivate the suspect into making the confession." *Id.* at 26. One of these techniques is to confront the suspect with the earlier admission, which is what occurred in this case.

If a *Miranda* warning precedes the interrogation, this is a perfectly legitimate technique. But in this case, the interrogation proceeded without the required warning, and then after the first admission was made, only a short break and then a *Miranda* warning interrupted the interrogation.

This was undeniably an "end run" around *Miranda*. When an officer chooses to use this tactic, the officer should, under *Miranda*, understand the risks of doing so. The biggest risk is that the prosecution may not be able to use the statement in its

---

[3] See ROBERT F. ROYAL & STEVEN R. SCHUTT, THE GENTLE ART OF INTERVIEWING AND INTERROGATION 143 (1976).

case in chief. That risk, of course, may be weighed against the desirability of getting information, such as the names of witnesses or location of physical evidence. And it may well be, under circumstances that differ from those in this case, that the prosecution may nevertheless be able to show that the confession was voluntary despite the *Miranda*-based presumption to the contrary.

Voluntariness of the Subsequent Admission

Upon finding an intentional *Miranda* violation, a court must ascertain whether the warned statement was voluntary. In doing so, the court examines the facts and circumstances to "determine the degree of causal connection between any unconstitutional conduct (and the statement resulting therefrom) and the confession made later." *State v. Fakes*, 51 S.W.3d 24, 30 (Mo. App. 2001) (citing *State v. Wright*, 515 S.W.2d 421, 426 (Mo. banc 1974)). The court should ascertain whether the purpose of the violation was to "undermine the suspect's ability to exercise his free will." *Elstad*, 470 U.S. at 309.

In light of the record in this case, this Court presumes the violation of *Miranda* was a tactic to elicit a confession and was used to weaken Seibert's ability to knowingly and voluntarily exercise her constitutional rights. If the truth were otherwise, Officer Hanrahan would not have specifically instructed the arresting officer to refrain from giving a *Miranda* warning. He wanted to secure a "breakthrough" admission before warning Seibert of her rights because he feared that she would assert those rights were she made aware of them.

Another important consideration in determining voluntariness is the proximity in time and place of the subsequent confession. If the warned confession is far enough removed from the first confession, the accused more likely made a voluntary decision to speak again. While each situation

is fact-specific, courts can look to whether the subsequent confession closely followed the first and was obtained by the same officials in the same surroundings. For example, in the case at bar, Seibert was questioned for 30 to 40 minutes, in an intense manner. She became emotional during the interview and, at one point, Officer Hanrahan squeezed her arm and repeatedly stated, "Donald was to die in his sleep." He continued in this manner until Seibert agreed that Donald was supposed to die in the fire. Then, after a 20-minute break, Seibert was read and waived her *Miranda* rights. The same officers interrogated her in the same room only minutes after her unwarned confession. It was at this point that she confirmed her unwarned statements.

In these circumstances, little if any weight can be given to the fact that Seibert signed a *Miranda* waiver.[4] In *State v. Fakes*, the court of appeals suppressed a similar confession. Fakes was interrogated at length while at the police station before receiving the *Miranda* warning. The interrogation was intense, and officials did not give Fakes a *Miranda* warning until she became emotional. *Fakes*, 51 S.W.3d at 32. In suppressing Fakes' post-*Miranda* confession, the court questioned the voluntariness of Fakes' *Miranda* waiver: "In view of the fact that she was so extensively interrogated before she was advised of her rights, it is not as clear as in *Wright* and *Elstad* that she later voluntarily waived those rights when, after finally having been advised of her rights, she confirmed the statements made earlier." *Id.* at 33. In situations such as these, where the accused is subjected to a nearly continuous period of

---

[4] This is true even though Officer Hanrahan read each part of *Miranda* to Seibert, having her orally express her understanding of each right independently and then instructing her to initial and sign a waiver form. Adherence to such formality 30 minutes into the interrogation does not change the fact that she was subjected to a nearly continuous interrogation, which began without a proper *Miranda* warning.

interrogation, it is unreasonable to assume - and there is nothing in the record to support such an assumption - that the simple recitation of *Miranda* would resurrect the opportunity to obtain a voluntary waiver.

The Eighth Circuit, in *United States v. Carter*, suppressed a written confession, which was executed after an initial unwarned interrogation that was followed by a *Miranda* warning. In *Carter*, postal inspectors interrogated the suspect, without giving the *Miranda* warning, about his alleged possession of stolen mail for nearly an hour before he confessed. The interrogation took place in the bank president's office, in the building where Carter worked, with Carter seated between the two inspectors. *United States v. Carter*, 884 F.2d 368, 372 (8th Cir. 1989). The court found the second warned confession "came almost directly on the heals" [sic] of the first unwarned confession and that the unwarned confession, subsequent warnings and confession were "part and parcel of a continuous process." *Id.* at 373.

When presented with different circumstances, the result may be different. In *Wright*, for example, the accused was brought into the interrogation room while the officer was questioning another suspect. Without first advising Wright of his constitutional rights, the officer asked him, "What did you do with the shotgun?" or words to that effect. Wright replied, "Leroy, you know I gave you the shotgun. I don't know where it is at." The officer advised Wright not to make any further statements. Wright was then placed in juvenile custody. *Wright*, 515 S.W.2d 421, 423 (Mo. banc 1974). In finding that Wright's subsequent statements were not coerced, the court noted the second interrogation was held the following day, at a different location (the juvenile building instead of the police station), and with different people present (Wright's mother and juvenile officers). *Id.* at 427.

Elstad also is distinguishable in that there was no evidence, as in the instant case, that the breach of *Miranda* was part of a premeditated tactic to elicit a confession. "The arresting officers' testimony indicates that the brief stop in the living room before proceeding to the station house was not to interrogate the suspect, but to notify his mother of the reason for the arrest." *Elstad*, 470 U.S. at 315. The *Elstad* court did not find that the police engaged in "improper tactics".

Here, however, Officer Hanrahan candidly admitted that the breach of *Miranda* was intentional and part of a tactic to elicit a confession. It is presumed that this strategy was used to weaken Seibert's ability to knowingly and voluntarily exercise her constitutional rights. Further, a 20-minute break and *Miranda* warning separating the unwarned confession from the warned confession was not enough to disturb the continuity of the interrogation where Officer Hanrahan tied the two stages of the interview together by using her statements in the first stage to correct her during the second stage.

Officer Hanrahan's intentional omission of a *Miranda* warning was intended to deprive Seibert of the opportunity knowingly and intelligently to waive her *Miranda* rights. Both stages of the interview formed a nearly continuous interrogation - she was interrogated by the same officials in the same place with only minutes separating the unwarned and warned questioning. There are no circumstances that would seem to dispel the effect of the *Miranda* violation. For these reasons, Seibert's post-*Miranda* waiver and confession was involuntary and, therefore, inadmissible. To hold otherwise would encourage future *Miranda* violations and, inevitably, *Miranda*'s role in protecting the privilege against self- incrimination would diminish. Were police able to use this "end run" around *Miranda* to secure the all-important "breakthrough" admission, the requirement of a warning would be meaningless. Officers would have no incentive to warn, knowing they could

accomplish indirectly what they could not accomplish directly.[5] Almost twenty years ago, in his *Elstad* dissent, Justice Brennan predicted in what the *Elstad* majority described as an "apocalyptic tone" that *Elstad* would deliver a "crippling blow" to *Miranda*. *Elstad*, 470 U.S. at 318 n.5, 319. Brennan warned that *Elstad* gave authorities "every incentive . . . to interrogate suspects without warnings or an effective waiver, knowing that the fruits of such interrogations 'ordinarily' will be admitted, that an admissible subsequent confession 'ordinarily' can be obtained simply by reciting the *Miranda* warnings shortly after the first has been procured and asking the accused to repeat himself . . . ." *Id.* at 358. And, as evidenced by the testimony of officer Hanrahan, officers not only have incentive to intentionally interrogate suspects without administering *Miranda* - they are being trained to do so. The *Elstad* majority, however, said Brennan's apocalyptic prediction - which is what happened in this case - would not result. "Justice Brennan not only distorts the reasoning and holding of our decision, but, worse, invites trial courts and prosecutors to do the same." *Id.* at 318 n.5.

Prejudice

Because the trial court erred in admitting Seibert's post-*Miranda* confession, the case should be reversed and remanded for a new trial unless the error was harmless. *State v. Miller*, 650 S.W.2d 619, 621 (Mo. banc 1983). Seibert was convicted of second degree murder as an accessory for knowingly killing Donald Rector. The jury was able to both read and hear her statements that she knew the mobile home was to be burned and that Donald could die in his sleep because he was on Prozac. At one point, she agreed with Officer Hanrahan that Donald

---

[5] See Robert M. Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 CALIF. L. REV. 579, 620 (1968).

was supposed to die in his sleep after he reminded her of her pre-*Miranda* confession. Because of the evidentiary strength of a confession,[6] and because of the contents of Seibert's involuntary statements, her statements certainly were not harmless.

Conclusion

The interrogation was set up to violate *Miranda* to secure a confession. The trial court suppressed only the unwarned portion of the interrogation. But on this record, the prosecution has not overcome the presumption that this tactic produced an involuntary confession. The confession in the remaining portion of the interrogation also should have been suppressed.

The judgment is reversed, and the case is remanded for a new trial.

Michael A. Wolff, Judge

White, Stith and Teitelman, JJ., concur;

Benton, J., dissents in separate opinion filed;

Limbaugh, C.J., and Price, J., concur in opinion of Benton, J.

---

[6] "A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him . . . . The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct.'" *Arizona v. Fulminante*, 499 U.S. 279, 296, 113 L. Ed. 2d 302, 111 S. Ct. 1246 (1991) (quoting *Bruton v. United States*, 391 U.S. 123, 139-40, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968) (White, J., dissenting)).

DISSENTING OPINION

Because the principal opinion does not follow the binding precedent, *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985), I dissent.

Elstad holds that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving [her] rights and confessing after [she] has been given the requisite *Miranda* warnings." *Elstad*, 470 U.S. at 318, 105 S. Ct. at 1298, 84 L. Ed. 2d at 238. Patrice Seibert's unwarned responses to Officer Hanrahan's questioning did not prevent her from waiving her rights and confessing.

"In these circumstances [where the preceding admission is unwarned but voluntary], a careful and thorough administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible." *Elstad*, 470 U.S. at 310-311, 105 S. Ct. at 1294, 84 L. Ed. 2d at 233. In this case, the administration of *Miranda* warnings was careful and thorough, as demonstrated by the tape recording of the administration, and by the form that Seibert initialed, dated and signed. As in *Elstad*, the reading of Seibert's rights was undeniably complete and recorded. *Elstad*, 470 U.S. at 314-315, 105 S. Ct. at 1296, 84 L. Ed. 2d at 236. Moreover, Seibert was 39 years old when she confessed. Appendix A to this opinion is the "Warning & Waiver Form." Appendix B is the testimony discussing it.

"A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." *Elstad*, 470 U.S. at 314, 105 S. Ct. at 1296, 84 L. Ed. 2d at 235. The *Miranda* warnings given Seibert "ordinarily" should make her later confession admissible.

"Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." *Elstad*, 470 U.S. at 309, 105 S. Ct. at 1293, 84 L. Ed. 2d at 232. In this case, Seibert's unwarned admissions were suppressed. The circuit court found that the warned statement was knowingly and voluntarily made. "In reviewing preserved error relating to a trial court's order on a motion to suppress evidence, the facts and reasonable inferences from such facts are considered favorably to the trial court's ruling, and contrary evidence and inferences are disregarded." *State v. Galazin*, 58 S.W.3d 500, 507 (Mo. banc 2001).

"It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise [her] free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period." *Elstad*, 470 U.S. at 309, 105 S. Ct. at 1293, 84 L. Ed. 2d at 232. In this case, there was no "actual coercion" of Seibert, or "other circumstances" that undermined her free will. *Elstad* holds flatly that the "psychological impact of voluntary disclosure of a guilty secret" is not coercion, nor does it compromise the voluntariness of a subsequent informed waiver. *Elstad*, 470 U.S. at 312, 105 S. Ct. at 1294, 84 L. Ed. 2d at 234. The *Elstad* opinion disapproves such "cat out of the bag" logic as "expansive." *Id.*

"Absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion." *Elstad*, 470 U.S. at 314, 105 S. Ct. at 1296, 84 L. Ed. 2d at 235. In Seibert's case, there were no deliberately coercive tactics. No firearms were produced, or shown to

Seibert during her interrogation. There were no threats in any way, nor physical or verbal abuse. The conversation was in "very low conversational tones." No inducements or promises were made. There is no evidence of deliberately coercive tactics.

The principal opinion distinguishes *Elstad*, noting that in that case there were no "improper tactics." In Seibert's case, the principal opinion finds improper tactics, when it presumes that the officer intended to deprive her "of the opportunity knowingly and intelligently to waive her *Miranda* rights."

If there were substantial evidence that the officer did the following - "inherently coercive police tactics or methods offensive to due process that render the initial admission involuntary and undermine the suspect's will to invoke [her] rights once they are read to [her]" - then the warned confession should be suppressed. See *Elstad*, 470 U.S. at 317, 105 S. Ct. at 1297, 84 L. Ed. 2d at 237.

At this critical point, the majority presumes that the officer's strategy had the purpose "to weaken Seibert's ability to knowingly and voluntarily exercise her constitutional rights." No evidence supports this assumption. Siebert did not testify at any hearing or at trial. Officer Hanrahan testified at the hearing that his "hope" and "intent" were to gain some sort of confession or admission of guilt. The officer did not mention "breakthrough" or "beachhead" interrogation. In addition to the "rolling the dice" paragraph quoted in the principal opinion, Officer Hanrahan testified that withholding *Miranda* rights at the outset means:

A. You may not get any information at all.

Q. In which part of the interrogation?

A. In either part. You may never even get to the second stage.

Officer Hanrahan testified that based on two prior conversations with Seibert, he believed she expected to be arrested and would have a story rehearsed. Although defense counsel asked Officer Hanrahan about interrogation techniques at both the suppression hearing and the trial, the Officer - the only witness to testify about the confession - stated that his hope and intent was to gain a confession or admission.

Elstad expressly commends confessions: "Voluntary statements 'remain a proper element in law enforcement.'" *Elstad*, 470 U.S. at 305, 105 S. Ct. at 1291, 84 L. Ed. 2d at 229, quoting *Miranda v. Arizona*, 384 U.S. at 478, 86 S.Ct. at 1630. "Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable . . . Absent some officially coerced self-accusation, the Fifth Amendment is not violated by even the most damning admissions." *Elstad*, 470 U.S. at 305, 105 S. Ct. at 1291, 84 L. Ed. 2d at 229. "When neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder." *Elstad*, 470 U.S. at 312, 105 S. Ct. at 1294-95, 84 L. Ed. 2d at 234. *Elstad* invokes cases holding confessions voluntary, even though police falsely stated that a codefendant turned State's evidence, or although the defendant did not know that a prior coerced confession could not be admitted. *Elstad*, 470 U.S. at 317, 105 S. Ct. at 1297, 84 L. Ed. 2d at 237. *See also Moran v. Burbine*, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986) (police failed to tell suspect of attorney's efforts to reach him; confession admitted, after voluntary waiver); *Oregon v. Mathiason*, 429 U.S. 492, 495-96, 97 S. Ct. 711, 714, 50 L. Ed. 2d 714, 719 (1999) (police falsely told suspect his fingerprints found at scene, not *Miranda* violation). "*Miranda* forbids

coercion, not mere strategic deception . . . Ploys to mislead a suspect or lull [her] into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns." *Illinois v. Perkins*, 496 U.S. 292, 297, 110 S. Ct. 2394, 2397, 110 L. Ed. 2d 243, 251 (1990). Placing an undercover agent near the suspect in order to gather incriminating information is permissible under the Fifth Amendment. *Hoffa v. United States*, 385 U.S. 293, 304, 87 S. Ct. 408, 414, 17 L. Ed. 2d 374, 383 (1966).

The principal opinion, in emphasizing the factors of lapse-of-time, change-of- place, change-of-interrogators, and need-to-dissipate-taint, echoes the Oregon court reversed in *Elstad*, and the other courts criticized in *Elstad*. *Elstad*, 470 U.S. at 303, 310, 317-18, 105 S. Ct. at 1290, 1293, 1297, 84 L.Ed. 2d at 228, 233, 237. *Elstad* makes clear that these factors are considered only if the first confession is coerced. *Id.*

Elstad is still binding precedent. *Elstad* was approved in *Dickerson v. United States*, 530 U.S. 428, 441, 120 S. Ct. 2326, 2335, 147 L. Ed. 2d 405, 418 (2000). The United States Supreme Court re-affirmed that the traditional "fruits" doctrine developed in Fourth Amendment cases does not apply to unwarned interrogation under the Fifth Amendment. *Id.* The holding of Dickerson is: "*Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts." *Dickerson*, 530 U.S. at 432, 120 S. Ct. at 2329-30, 147 L. Ed. 2d at 412. This "progeny" includes the *Elstad* case, as demonstrated by *Dickerson*'s express discussion of *Elstad* (summarized above), and by *Dickerson*'s implicit approval: "If anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief." *Dickerson*, 530 U.S. at 443-44, 120 S. Ct. at 2336, 147 L. Ed. 2d at 420.

The principal opinion asserts that *Elstad* does not apply where police intentionally withhold *Miranda* warnings before the initial unwarned statement. True, *Elstad*, at one point, describes the initial unwarned statement as "technically in violation of *Miranda*." *Elstad*, 470 U.S. at 318, 105 S. Ct. at 1297-98, 84 L. Ed. 2d at 238. This passing comment in *Elstad* does not support the principal opinion, as demonstrated in recent opinions by the Courts of Appeals.

On facts nearly identical to this case, the United States Court of Appeals for the Ninth Circuit, en banc, held that *Elstad* applies so long as the initial unwarned statement is not actually coerced. *United States v. Orso*, 266 F.3d 1030, 1035, 1039 (9th Cir. en banc), *full en banc hearing denied*, 275 F.3d 1190 (2001). The United States Supreme Court denied certiorari on the Orso case, while this case was pending. _____ U.S. _____, 154 L. Ed. 2d 42, 123 S. Ct. 125 (2002).

It is also true that the Eighth Circuit has made statements to the contrary. *United States v. Carter*, 884 F.2d 368, 372-74 (8th Cir. 1989). However, yet another Circuit, the First, called Carter's statements "dicta" and "facially inconsistent with the Supreme Court's holding in *Elstad*." *United States v. Esquilin*, 208 F.3d 315, 320 (1st Cir. 2000). The First Circuit then holds that deliberate withholding of *Miranda* rights before the unwarned admission does not make a later warned statement inadmissible. *Id.* at 320-21. Directly refuting the principal opinion's reliance on "deterrence" against "improper tactics," the First Circuit holds:

Although *Elstad* does not permit suppression of Esquilin's voluntary statement made after he was informed of his *Miranda* rights and voluntarily waived them, the basic *Miranda* rule still operates here to render Esquilin's initial unwarned (but voluntary) statement inadmissible. The Supreme Court has ruled that *Miranda*'s deterrence rationale requires no more than

that, *see Elstad*, 470 U.S. at 308, 105 S. Ct. 1285, and we are not free to ignore that judgement.

Id. at 321. The *Esquilin* case also specifically holds that *Elstad* rejects the "nearly continuous" and "time lapse" arguments, both invoked by the principal opinion. *Id.* at 319.

As for the other authority the principal opinion discusses, *Elstad* renders obsolete the contrary approach in this Court's decision eleven years earlier in *State v. Wright*, 515 S.W.2d 421, 426-27 (Mo. banc 1974), and in the Court of Appeal's decision last year in *State v. Fakes*, 51 S.W.3d 24, 30 (Mo. App. 2001).

Once the questions of law are resolved, it is clear that the trial judge should be affirmed. "When reviewing a trial court's ruling on a motion to suppress, the inquiry is limited to whether the court's decision is supported by substantial evidence, and deference is given to the trial court's superior opportunity to determine credibility of witnesses." *State v. Feltrop*, 803 S.W.2d 1, 12 (Mo. banc), *cert. denied*, 501 U.S. 1262, 115 L. Ed. 2d 1081, 111 S. Ct. 2918 (1991). On this record, there is substantial evidence that both the unwarned and warned statements were voluntary. Thus, under *Elstad*, the warned statement is admissible, as the trial judge ruled.

DUANE BENTON, Judge

APPENDIX A

ST LOUIS COUNTY DEPARTMENT OF POLICE

WARNING & WAIVER FORM

Before we ask you any questions, you must understand what your rights are:

"Initialed PDS" 1. You do not have to make any statement at this time and have a right to remain silent.

"Initialed PDS" 2. Anything you say can and will be used against you in a court of law.

"Initialed PDS" 3. You are entitled to consult with an attorney before any interview and to have an attorney present at the time of interrogation.

"Initialed PDS" 4. If you cannot afford an attorney, one will be appointed for you.

5. (Juvenile Suspects Only) If you are fourteen years of age or older you could be tried in court as an adult.

I have read the above statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Patricia D. Seibert

Signature of Suspect

February 17, 1997

Date

4:30 a.m.

Time

I hereby certify that the foregoing Warning and Waiver was read by me to the above suspect, that the suspect also read it, and the suspect has affixed his (her) signature hereto in my presence.

Richard E. Hanrahan

Signature - Police Officer

Rodger R. Windle 1474

Witness (In the case of a juvenile suspect, the attending Deputy Juvenile Officer)

Appendix B

Trial Testimony of Officer Richard E. Hanrahan

(Excerpt of Transcript March 28, 200, Pages 917, line 18 - 920, line 15)

Q. When you arrived at the station, you had an initial conversation with her --is that correct?

A. That's correct.

Q. After that initial conversation did you inform the Defendant of her rights under the Miranda decision?

A. Yes, I did.

Q. I'd like to hand you what's been marked as State's Exhibit 37 and ask you if you can tell me what this is please?

A. Yes, sir - this is a rights advisement provided by the detective with St. Louis County that night.

Q. And was that, in fact, read to the Defendant?

A. Yes, sir, it was.

Q. And did you ask her if she understood each of those rights as you read them to her?

A. As I read them to her, I simply check-marked them when I was finished. I asked her if she understood each right.

Q. Did she indicate to you in some fashion whether she did or not?

A. Yes, she did.

Q. And what was her response in each case?

A. She indicated that she understood and she signed next to each of the rights to state that she understood.

Q. And sir, did you then read the waiver portion of the form?

A. I believe I let her read the waiver. I'd have to check my report to be sure. I usually allow the suspect to read the waiver.

Q. How does that waiver read?

A. It says - "I have read the above statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of

any kind has been used against me."

Q. In fact, did you threaten the Defendant in any fashion?

A. I did not.

Q. Did you display a weapon or threaten a weapon -- I mean, you can do things that are non-verbal. Did you do anything that would be taken as threatening by the average person?

A. I don't believe so - no, sir.

Q. Did you promise the Defendant any benefit of any kind in order to induce her to speak with you?

A. The truth would make her feel much better.

Q. Was that all you said?

A. I believe so. I told her I believed that she was lying and the lie was hurting her.

Q. Sir, did you, in fact, ask her to sign that form if she understood her rights and agreed to speak with you?

A. Yes, sir, I did.

Q. And did the Defendant do so in your presence?

A. Yes, sir, she did.

Q. Would you point out her signature to the Court please?

A. (Complies)

Q. And sir, did you sign that form yourself as a witness?

A. Yes, sir. I did.

Q. And was anyone with you who also signed that form?

A. Fire Marshal Rodger Windle was also there.

Q. And are both your signatures then present on that form as witnesses to her signature and waiver of having been informed and waiving her rights?

A. Yes, sir, they are.

Q. Would you point out your signature and Officer Windle's signature please?

A. (Complies)

(9)

No. 02-1371

In the
SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,
Petitioner,

v.

PATRICE SEIBERT,
Respondent.

On Petition for Writ of Certiorari
to the Missouri Supreme Court

BRIEF IN OPPOSITION FOR RESPONDENT

WILLIAM J. SWIFT
Assistant Public Defender
Counsel of Record

AMY M. BARTHOLOW
Assistant Public Defender
3402 Buttonwood Drive
Columbia, MO 65201
Phone: (573) 882-9855
Fax: (573) 875-2594
Of counsel

Attorneys for Respondent

19 pp

QUESTION PRESENTED

Whether the Missouri Supreme Court correctly concluded that, under the totality of the circumstances, Patrice Seibert's pre-Miranda statement was involuntary where she was awoken in a hospital at 3:00 a.m., placed under arrest, taken to the police station, interrogated for 30-40 minutes without being advised of her Miranda rights, while police officers repeatedly squeezed her arm and suggested that the victim of a fire at her home was "supposed to die in his sleep"?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

CORRECTION OF JURISDICTIONAL STATEMENT 1

SUMMARY OF THE ARGUMENT 1

CORRECTION OF INSUFFICIENT FACTUAL SUMMARY 2

I. Misstatement of fact 3

II. Missing facts 4

REASONS FOR DENYING THE WRIT 6

I. The practice of withholding rights is not widespread, especially after *Dickerson v. United States* 6

II. Lower court opinions cited by petitioner merely reach different results under the highly fact-specific voluntariness inquiry 8

III. The Missouri Supreme Court's decision was correct under this Court's existing precedent in *Westover v. United States* 11

CONCLUSION 12

TABLE OF AUTHORITIES

CASES **Page**

Arizona v. Fulminante, 499 U.S. 279 (1991) 3

Berkemer v. McCarty, 468 U.S. 420 (1984) 7

Brown v. Illinois, 422 U.S. 590 (1975) 10

Davis v. North Carolina, 384 U.S. 737 (1966) 3

Dickerson v. United States, 530 U.S. 428 (2000) 6-7

Haynes v. Washington, 373 U.S. 503 (1963) 3

Michigan v. Mosley, 423 U.S. 96 (1975) 11

Miller v. Fenton, 474 U.S. 104 (1985). 3

Miranda v. Arizona, 384 U.S. 436 (1966) 7

Oregon v. Elstad, 470 U.S. 298 (1985). 6

State v. Fakes, 51 S.W.3d 24 (Mo. App. 2001) 11

State v. Wright, 515 S.W.2d 421 (Mo. banc 1974) 2

United States v. Carter, 884 F.2d 368 (8th Cir. 1989) 8-9

United States v. Esquilin, 208 F.3d 315 (1st Cir. 2000) 9-10

United States v. Gale, 952 F.2d 1412 (D.C. Cir. 1992) 8

United States v. Orso, 266 F.3d 1030 (9th Cir. 2001) 8-10

Westover v. United States, 384 U.S. 436 (1966) 11

Withrow v. Williams, 507 U.S. 680 (1993) 6, 7

STATUTORY AUTHORITIES

28 U.S.C. 1254(1) 1

28 U.S.C. 1257(a) 1

OPINION BELOW

The opinion of the Missouri Supreme Court (Pet. App. 1-26) is reported at 93 S.W.3d 700 (Mo. banc 2002).

JURISDICTION

The judgment of the Missouri Supreme Court was entered on December 10, 2002. The petition for a writ of certiorari was filed on March 10, 2003. Petitioner invokes the jurisdiction of this court under 28 U.S.C. 1254(1); however, that provision relates to certiorari review of decisions by the federal courts of appeal. Jurisdiction is properly invoked under 28 U.S.C. 1257(a), authorizing this Court to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had ... where any title, right, privilege, or immunity is specially set up or claimed under the Constitution."

SUMMARY OF THE ARGUMENT

The Court should deny the petition for a writ of certiorari. Petitioner's argument rests on an incomplete and inaccurate account of the facts and the opinion below. When considered fully, the Missouri Supreme Court's decision represents nothing more than a straightforward application of the Due Process voluntariness test under an extreme set of facts unlikely to be repeated often. As it did at the government's recommendation in *United States v. Orso*, the Court should again deny certiorari over this fact-bound question that does not implicate a

clear legal disagreement between the federal courts of appeals or state supreme courts. Indeed, the decision below faithfully applies this Court's decision in *Westover v. United States*.

PETITIONER'S FACTUAL SUMMARY IS NOT SUFFICIENT TO RESOLVE THE QUESTION PRESENTED

Petitioner's question presented to the Court concerns the voluntariness of respondent's confession (Pet. App. i). A proper recitation of the factual history is critically important, as the resolution of a voluntariness inquiry is necessarily fact-bound. The unique nature of the facts in this case was recognized in the Missouri Supreme Court's opinion, wherein it used three distinct phrases to distinguish this case from other factual scenarios:

1) "And it may well be, *under circumstances that differ from those in this case*, that the prosecution may nevertheless be able to show that the confession was voluntary despite the Miranda-based presumption to the contrary." (Pet. App. 9) (emphasis added).

2) "*In light of the record in this case*, this Court presumes the violation of *Miranda* was a tactic to elicit a confession and was used to weaken Seibert's ability to knowingly and voluntarily exercise her constitutional rights." (Pet. App. 9) (emphasis added).

3) "*When presented with different circumstances, the result may be different*." [As an example, the Court discusses another Missouri case, *State v.*

Wright, 515 S.W.2d 421 (Mo. banc 1974), noting that Wright's subsequent statements were not coerced because "the second interrogation was held the following day, at a different location...and with different people present."] (Pet. App. A-11) (emphasis added).

In this particular case, where the fact-pattern is highly unusual, Petitioner's incomplete recitation of the facts must be corrected in order to ensure a proper review.[1] A more satisfactory factual summary is set forth in the Missouri Supreme Court's opinion (Pet. App. 1-26); however, respondent specifically draws the Court's attention to the following facts, relevant to the question presented, that were absent or misstated in petitioner's statement:

1. *Misstatement of fact*.

Petitioner states that respondent had a "role in arranging to burn down her mobile home, with a man inside, to cover up the death of her son [Jonathan] (who had apparently died of neglect for which respondent might have been blamed)." (Pet. 4). This is clearly a misstatement of the record below. The evidence, as presented through the State's medical examiner did not show that Jonathan died of neglect; in fact, the cause of death was never determined (Trial record 755-758).

[1] While this Court normally gives great deference to the factual findings of the state court, *see Davis v. North Carolina*, 384 U.S. 737, 741 (1966); *Haynes v. Washington*, 373 U.S. 503 (1963), "the ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination." *Miller v. Fenton* 474 U.S. 104, 112 (1985); *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991).

2. *Missing facts*

a) *The arrest:*

Petitioner simply states that "five days after the fire, respondent was arrested and taken to the police station, where she was placed in an interview room." (Pet. 4). This lone sentence disregards many of the facts surrounding respondent's arrest that were clearly important to the Missouri Supreme Court's holding. The facts, as more fully explicated by the court below, are as follows: On February 17, 1997, five days after the fire, respondent was asleep in a St. Louis hospital, where her oldest son was being treated for severe burns that he received in the fire (Pet. App. 2-3). Officer Clinton woke her at 3:00 a.m. and placed her under arrest (Pet. App. 3). Officer Hanrahan, who directed the arrest, specifically instructed Officer Clinton *not* to advise respondent of her *Miranda* rights. (Pet. App. 3). Once at the police station, respondent was left in a small interview room for 15-20 minutes to "give her a little time to think about the situation." (Pet. App. 3).

b) *The interrogation:*

Petitioner withheld from the petition the following facts about the interrogation: During the 30-40 minute unwarned interrogation, Officer Hanrahan squeezed respondent's arm and repeated the same statement, "Donald was also to die in his sleep," throughout much of the interview (Pet. App. 3)[2]. Respondent was questioned "in an intense manner" and she "became emotional during the

[2] "Donald" refers to a friend of respondent's oldest son who lived at respondent's home. (Pet. App. 2, Trial Record 754, 836, 854-855).

interview." (Pet. App. 10). Officer Hanrahan continued in this "intense manner" until respondent agreed that "Donald was to die in his sleep." (Pet. App. 10). When respondent finally made this admission, she was given a short break for a cup of coffee and a cigarette (Pet. App. 3). Thereafter, Officer Hanrahan began the second stage of the interrogation, advising respondent of her rights for the first time (Pet. App. 3). He began this second stage of his interrogation by referring to the first stage: "Ok, 'trice, we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?" (Pet. App. 3). Then, with occasional reference to the first stage, pre-*Miranda* interrogation, Officer Hanrahan continued to question respondent until she repeated the statements she had made before receiving *Miranda* (Pet. App. 3). The reiterated confession closely followed the initial confession, and Officer Hanrahan obtained both in the same surroundings (Pet. App. 10).

By reviewing the factual discussion contained in the Missouri Supreme Court's opinion, as opposed to the petition, this Court will be better equipped to evaluate the propriety of granting or denying a writ in this case.

REASONS FOR DENYING THE WRIT

The practice of deliberately withholding the required warnings is not widespread, and the continued risk of such practice is minimal after Dickerson v. United States

Petitioner asserts that law enforcement officers nationwide are being trained to violate *Miranda* (Pet. 16-18). Petitioner has presented no concrete evidence to suggest that this type of training is widespread; indeed, an article in the FBI's Law Enforcement Bulletin from August 2001, Volume 70, No. 8, entitled *Miranda Revisited* (discussing the impact of *Dickerson*), warned that this type of training must be terminated immediately:

> "Departments must ensure that their officers do not interrogate 'outside Miranda,' and immediately abandon any condoned practice or policy of intentional violations of Miranda."

http://www.fbi.gov/publications/leb/2001/august2001/aug01p27.htm

In reality, very few *Miranda* cases decided in the nearly two decades since *Oregon v. Elstad*,[3] involve the deliberate refusal to give warnings once the custodial interrogation has commenced.[4] This is not surprising since this Court generally

---

[3] *Oregon v. Elstad*, 470 U.S. 198 (1985).

[4] As noted by Justice O'Connor: "The published decisions of the lower federal courts show that ... [i]n case after case, the courts are asked on habeas to decide purely technical *Miranda* questions that contain not even a hint of police overreaching. And in case after case, no voluntariness issue is raised, primarily because none exists. *Withrow v. Williams*, 507 U.S. 680, 709-710 (1993) (O'Connor, J., dissenting).

expects that law enforcement officers will follow its decisions -- especially those in which the Court's specific purpose was to delineate "concrete constitutional guidelines for law enforcement agencies and courts to follow." *Miranda v. Arizona*, 384 U.S. 436, 442 (1966).[5]

Moreover, occasions such as this one, where the police deliberately refuse to Mirandize suspects, can be expected to decline after this Court's decision in *Dickerson v. United States*, 530 U.S. 428 (2000). The custodial interrogation in this case took place in 1997; therefore, the interrogating officer's alleged training would not have included any explanation of this court's decision in *Dickerson*. This Court previously has recognized law enforcements' tendency to "grow in constitutional as well as technological sophistication, and there is little reason to believe that the police today are unable, or even generally unwilling, to satisfy *Miranda's* requirements." *Withrow v. Williams*, 507 U.S. 680, 695 (1993)[6]. Thus, after *Dickerson*, this Court can expect law enforcement to become even more vigilant about the timely administration of *Miranda* warnings. It is simply not a worthwhile endeavor for this Court to address a case that will affect so few defendants.

---

[5] *See Berkemer v. McCarty*, 468 U.S. 420, 433 (1984) ("we have no doubt that, in conducting most custodial interrogations...the police behave responsibly and do not deliberately exert pressures upon the suspect to confess against his will.); and *Withrow v. Williams*, 507 U.S. 680, 714 (1993) (O'Connor, J., dissenting) ("We can depend on law enforcement officials to administer warnings in the first instance and the state courts to provide a remedy when law enforcement officers err.")

[6] The government's brief in *Dickerson* confirms that "federal law enforcement agencies have concluded that...the issuance of *Miranda* warnings at the outset of a custodial interrogation is in the best interests of law enforcement as well as the suspect."

The lower court opinions cited by petitioner merely reach different results under the highly fact-specific and fact-dependent voluntariness inquiry

Petitioner places the Eighth Circuit, the Missouri Supreme Court and (with hesitancy)[7] the D.C. Circuit on one side of the alleged conflict and the First and Ninth Circuits on the other. However, a review of the cases cited by petitioner reveals that the Courts have reached different outcomes, not because they are in conflict, but because they are factually distinct.

The starting point for analyzing the cases cited by petitioner is *United States v. Orso*, No. 01-9455, where this Court denied certiorari just six months ago. In its brief in opposition in *Orso*, the United States explained how the Ninth Circuit's decision in that case, the First Circuit's holding in *United States v. Esquilin* and the Eighth Circuit's holding in *United States v. Carter* could be easily reconciled. As the government pointed out, the Eighth Circuit's application of *Elstad* was not essential to the decision in *Carter* because it alternatively held that the defendant's post-*Miranda* confession was the fruit of an unconstitutional search. *Carter*, 884 F.2d 368, 374 (8th Cir. 1989). Indeed, *Carter* involved an exceptional set of facts not present in *Orso*: "there was no passage of time to speak of between the unwarned confession and the subsequent warning and confession, all of which

---

[7] Petitioner states that the D.C. Circuit in *United States v. Gale*, 952 F.2d 1412 (D.C. Cir. 1992), "seems to have joined" the 8th Circuit on the side of the Missouri Supreme Court. However, *Gale* did not involve a deliberate refusal by the police officers to read a suspect his *Miranda* warnings, and the statement cited by petitioner is pure dicta. Moreover, it is not at all clear that the *Gale* court approved the holding of the 8th Circuit in *United States v. Carter*, 884 F.2d 368 (1989), since its facts were distinguishable.

occurred as part and parcel of a continuous process" and "the police had extracted an essentially complete confession at the time the *Miranda* warnings were given."

The Missouri Supreme Court simply applied this same reasoning to respondent's case. It found that the two stages of respondent's interrogation occurred in the same setting, with the same interrogator, who questioned her at length in an "intense manner," while purposefully withholding the *Miranda* warnings, until "she became emotional," and that the two stages amounted to "a nearly continuous period of interrogation," where the warned statement merely "confirmed her unwarned statements." (Pet. App. 9-12).

The Missouri Supreme Court did not carve out a *per se* exception to *Elstad* in cases where the police deliberately withhold *Miranda* rights, nor did it apply the "fruit of the poisonous tree" doctrine, as claimed by petitioner (Pet. 6). Rather, the Court simply applied the straight-forward voluntariness test found in *Elstad*. While the Court may have put a thumb on the scale, so to speak, in holding that the deliberate withholding of the *Miranda* rights created a presumption of coercion, it did not announce a *per se* rule (Pet. App. 9). Indeed, the Court made quite clear that "under circumstances that differ from those in this case, that the prosecution may nevertheless be able to show that the confession was voluntary despite the *Miranda*-based presumption to the contrary." (Pet. App. 9).

This is precisely the analysis in both the Ninth Circuit's *Orso* opinion, and the First Circuit's opinion in *United States v. Esquilin*, 208 F.3d 315 (1st Cir. 2000). The Ninth Circuit stated that "Orso's warned confession should therefore be

suppressed only if her statements in the car were involuntary, and any taint therefrom had not dissipated by that time." *Orso*, 266 F.3d at 1039. The First Circuit held that Esquilin's confession was not rendered involuntary solely by deliberately coercive or improper police tactics. *Esquilin*, 208 F.3d at 321. So, contrary to petitioner's claim, the legal landscape did not change after respondent's case was decided below. Instead, neither this case, nor *Orso*, nor *Esquilin*, has adopted a *per se* rule holding that the deliberate failure to Mirandize a defendant renders post-*Miranda* statements involuntary. Each case has applied the traditional due process voluntariness test to the second statement. While they have reached different results, that is not surprising since voluntariness findings depend so heavily on the facts and circumstances of each case.[8]

The Missouri Supreme Court took care to address the circumstances that rendered respondent's Mirandized confession involuntary. Officer Hanrahan's intentional refusal to advise respondent of her rights at the beginning of the interrogation process constituted but one such circumstance. Other indicia of involuntariness include the fact that she had been awoken at 3:00 a.m., taken from the hospital where she was sleeping by her burned child, and she was obviously emotionally distraught. In contrast, no such extreme indicia were present in *Orso* or *Esquilin*.

---

[8] *Brown v. Illinois*, 422 U.S. 590 (1975) (The question whether a confession is voluntary must be answered on the facts of each case.)

The Missouri Court's decision was correct under existing Supreme Court precedent

In *Westover v. United States*, 384 U.S. 436, 496-97 (1966) (a companion case consolidated with *Miranda*), this Court suppressed a confession because a prolonged, un-Mirandized, custodial interrogation preceded a Mirandized interrogation that produced a confession. This Court found that the eventual reading of the *Miranda* warnings did not ease the pressure from the first unlawful interrogation. Subsequently, this Court has described "the cardinal fact of *Westover*" as being "the failure of the police officers to give any warnings whatever to the person in their custody before embarking on an intense and prolonged interrogation of him." *Michigan v. Mosley*, 423 U.S. 96, 107 (1975).

Westover still applies in situations where the initial statement is involuntary, and upon the facts of respondent's case, *Westover* would require reversal. The Missouri Supreme Court never found that respondent's first statement was voluntary, and when judged side-by-side with the facts in *Westover*, it was clearly involuntary. In fact, the "break-in-the-stream" analysis by the Missouri Supreme Court, was a *Westover* analysis, it simply did not cite *Westover*. Rather, it cited another Missouri case, *State v. Fakes*, 51 S.W.3d 24, 32-33 (Mo. App. 2001), for the proposition that "where the accused is subjected to a nearly continuous period of interrogation, it is unreasonable to assume...that the simple recitation of *Miranda* would resurrect the opportunity to obtain a voluntary waiver." (Pet. App. 10-11).

As the Missouri Supreme Court's decision was correct under *Westover v. United States, supra*, this Court's certiorari review is not warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM J. SWIFT
Assistant Public Defender
Counsel of Record

AMY M. BARTHOLOW
Assistant Public Defender
Of Counsel

APRIL 18, 2003

No. 02-1371

In the
SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,
Petitioner,

v.

PATRICE SEIBERT,
Respondent.

RECEIVED
APR 23 2003
OFFICE OF THE CLERK
SUPREME COURT, U.S.

On Petition for Writ of Certiorari
to the Missouri Supreme Court

DECLARATION OF SERVICE

I, Amy M. Bartholow, hereby declare that on this 18th day of April, 2003, a copy of the Brief in Opposition for Respondent with attached *in forma pauperis* motion in the above case was served by mail, first-class, postage prepaid, on: James R. Layton, State Solicitor, P.O. Box 899, Jefferson City, MO 65102. Phone: (573) 751-3321, *Counsel of Record for Petitioner*. All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Amy M. Bartholow
Amy M. Bartholow
Assistant Public Defender
3402 Buttonwood
Columbia, MO 65201
Phone: (573) 882-9855
Of Counsel for Respondent

Executed before me this April 18, 2003.

JANET DIEMLER
MY COMMISSION EXPIRES
September 25, 2003
NOTARY SEAL
Callaway County
NOTARY PUBLIC STATE OF MISSOURI

Janet S. Diemler
Notary Public

My commission expires: September 25, 2003.

MISSOURI STATE PUBLIC DEFENDER SYSTEM

OFFICE OF STATE PUBLIC DEFENDER
3402 BUTTONWOOD
COLUMBIA, MISSOURI 65201-3722
TELEPHONE: (573) 882-9855 FAX: (573) 875-2594

April 18, 2003

William K. Suter, Clerk
Supreme Court of the United States
One First Street NE
Washington, D.C. 20543

RE: *State of Missouri v. Patrice Seibert*, No. 02-1371

Dear Mr. Suter:

Enclosed for filing are: 1) the original and ten (10) copies of the Brief in Opposition for Respondent; 2) the original and ten (10) copies of the motion to proceed *in forma pauperis* with respondent's notarized affidavit attached; and 3) a notarized declaration of service reflecting service on Petitioner's counsel.

Thank you for your attention in this matter. Please contact me if the enclosed documents prompt any questions.

Sincerely,

Amy M. Bartholow
AMY M. BARTHOLOW
Assistant Public Defender
Of Counsel for Petitioner

Enc.

RECEIVED
APR 23 2003
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
MAY 2 2003
CLERK

No. 02-1371

In the
SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,
Petitioner,

v.

PATRICE SEIBERT,
Respondent.

Petition for a Writ of Certiorari
to the Supreme Court of Missouri

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
JAMES R. LAYTON
State Solicitor
Counsel of Record
SHAUN J MACKELPRANG
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-0774
Counsel for Petitioner

TABLE OF AUTHORITIES

CASES

Dickerson v. United States, 530 U.S. 428 (2000) 3, 8

Fellers v. United States, No. 02-6320 ..... 1, 7

Miranda v. Arizona, 384 U.S. 436 (1966) ..... passim

Oregon v. Elstad, 470 U.S. 298 (1985) ..... passim

United States v. Esquilin, 208 F.3d 315 (1st Cir. 2000) 4, 5

United States v. Fellers, 285 F.3d 721 (8th Cir. 2002) ... 7

United States v. Orso, 266 F.3d 1030 (9th Cir. en banc 2001) 5

United States v. Patane, 304 F.3d 1013 (10th Cir. 2002) . 8

United States v. Patane, No. 02-1183 ..... 1, 8

Westover v. United States, 384 U.S. 436 (1966) 5-7

OTHER AUTHORITIES

71 U.S.L.W. 3555 (Feb. 25, 2003) 8

Federal Bureau of Investigation, Law Enforcement Bulletin, August 2001 ..... 1, 2

Respondent seeks to lessen the importance of the question presented in this case in three ways. But even her own authority demonstrates that law enforcement officers are being trained to do precisely what the officer here did, and there remains a divide among the courts with regard to the legality of that technique under *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Oregon v. Elstad*, 470 U.S. 298 (1985).

Since the Petition was filed, the Court has granted certiorari in two cases that present questions related to, though distinguishable from, the one stated here: *Fellers v. United States*, No. 02-6320, and *United States v. Patane*, No. 02-1183. Though the Court could choose to hold this case pending decisions in those cases, the better course would be to grant this petition and consider the three cases side-by-side.

1. Respondent begins by arguing that "[p]etitioner has presented no concrete evidence to suggest that this type of training [where an officer questions suspects "outside *Miranda*"] is widespread." Brief in Opposition to Certiorari ("Cert. Opp.") at 6. Respondent then points to a document, the Federal Bureau of Investigation's August 2001 Law Enforcement Bulletin (http://www.fbi.gov/publications/leb/2001/august2001/aug01p27.htm) ("Bulletin"), that actually fills the gap she incorrectly says petitioner left. She quotes, out of context, a single statement: "Departments must ensure that their officers do not interrogate 'outside Miranda,' and immediately abandon any condoned practice or policy of intentional violations of *Miranda*." *Id.* at 29, *see* Cert. Opp. at 6. But immediately before that sentence, the article confirms that officers are being trained to use the very techniques at issue here:

> These permissible uses of incriminating statements obtained in violation of *Miranda* have led to a practice in law enforcement of intentionally questioning in violation of *Miranda*. This practice is commonly referred to as questioning "outside *Miranda*." In fact, *numerous law enforcement agencies have encouraged and provided training in this practice* . . . .

Bulletin at 29 (emphasis added).

Respondent then points out that "very few *Miranda* cases decided in the nearly two decades since *Oregon v. Elstad*, involve the deliberate refusal to give warnings once the custodial interrogation has commenced." Cert. Opp. at 6. Her apparent premise is that any time a court did not discuss in a particular case whether the failure to warn was deliberate, then it must have been inadvertent. That premise might make sense when looking at future decisions in Missouri and other jurisdictions where intent is now relevant. But it makes no sense cast backwards. In *Elstad* this Court declined to attach any importance to the reason the officer failed to advise the suspect of his rights. Instead, the Court turned to the objective facts surrounding the questioning and concluded that the "incident had none of the earmarks of coercion." *Elstad*, 470 U.S. at 315-316. That so few courts have noted the intent of the officer merely highlights the alteration in the *Elstad* analysis that the Missouri court made.

Respondent does not directly dispute the negative impact that the divide among courts regarding subjective intent has on the concreteness of *Miranda*. Instead she minimizes that impact by asserting that law enforcement officers tend to follow this Court's decisions. Cert. Opp. at 6-7. We do not suggest otherwise. But as respondent

points out in her very next paragraph, law enforcement has a "tendency to 'grow in constitutional as well as technological sophistication.'" Cert. Opp. at 7. And that "sophistication" will include an understanding of the practical limitations on a rule that depends entirely on subjective intent.

Contrary to respondent's implication (Cert. Opp at 6-7), the addition of *Dickerson v. United States*, 530 U.S. 428 (2000), to the body of *Miranda* law does not significantly affect that result. Again, the Court in *Dickerson* expressly affirmed the continuing validity of *Oregon v. Elstad*. 530 U.S. at 441. The acknowledged sophistication of law enforcement will undoubtedly lead officers – at least in some jurisdictions – to continue to use techniques that approximate what occurred in *Elstad*. And those techniques will include or parallel the one whose legality is the subject of the debate that the Missouri Supreme Court entered here.

2. Respondent errs when she belittles the existence of that debate, claiming that there is no "clear legal disagreement between the federal courts of appeals or state supreme courts." Cert. Opp. at 1-2, 8-10. There is certainly a disagreement. And any lack of clarity is due to her obfuscation.

Respondent argues that the courts identified in the petition have merely reached different results because the cases before them were "factually distinct." Cert. Opp. at 8. But this is overly simplistic; there are always factual differences among cases. The truth remains that courts are applying opposing rules of law to the facts before them.

The divide is starkly portrayed by applying the First Circuit's holding in *United States v. Esquilin*, 208 F.3d 315 (1st Cir. 2000), to the facts here. The First Circuit expressly rejected the addition of an "intent" test in applying *Elstad*: "The addition of a subjective intent by the officer to violate *Miranda*, unaccompanied by any coercive conduct, cannot in itself undermine the suspect's free will." 208 F.3d at 321. Thus, the First Circuit would never reach the question of the officer's subjective intent. But the Missouri court found intent to be dispositive: "In light of the record in this case, this Court presumes the [intentional] violation of *Miranda* was a tactic to elicit a confession and was used to weaken Seibert's ability to knowingly and voluntarily exercise her constitutional rights." Petition Appendix at A9. The very same fact – the deliberate withholding of the *Miranda* warning – obtained a favorable result for Seibert but did nothing for Esquilin.

The divide cannot be papered over by a claim that the Missouri Supreme Court or any other court "simply applied the straight-forward voluntariness test found in *Elstad*." Cert. Opp. at 9. Indeed, that argument misses the point. *Elstad* calls for a determination of the voluntariness of a post-*Miranda* statement. But the question here is a different one: whether a pre-*Miranda* confession, regardless of whether it was voluntary, "taints" a second, post-*Miranda* confession if the failure to warn was deliberate. In *Elstad*, this Court held that, unless there is actual coercion, a pre-*Miranda* confession does not "taint" a post-*Miranda* confession. We do not know where a "straightforward" application of *Elstad* would lead the Missouri court, for in that court's view, the officer's "subjective intent" eliminates the need for a finding as to coercion.

Respondent's claim that the First and Ninth Circuits, too, merely followed *Elstad* (Cert. Opp. at 9-10) either misconstrues the meaning, or misinterprets the significance, of the decisions in *Esquilin* and *United States v. Orso*, 266 F.3d 1030 (9th Cir. en banc 2001). Neither court held "that the deliberate failure to Mirandize a defendant renders post-*Miranda* statements involuntary." Cert. Opp. at 10. And it is precisely at that point that the path taken by the Ninth and First Circuits and the one followed by the Missouri Supreme Court and others diverge. Subjective intent – the "deliberate[ness of the] failure" – defines one path but is irrelevant along the other.

Respondent argues that the "intentional refusal to advise respondent of her rights at the beginning of the interrogation process constituted but one" circumstance that the Missouri Supreme Court considered in determining that her post-*Miranda* confession was involuntary. Cert. Opp. at 10. But again, respondent misses the point. Subjective intent was not a factor to be considered in *Elstad*. And it is still not a factor in some jurisdictions. This petition asks whether the Constitution makes it a factor.

3. Lastly, despite the fact that there is not a single reference to *Westover v. United States*, 384 U.S. 436 (1966), in the Missouri court's opinion, respondent declares that "the decision below faithfully applies this Court's decision in *Westover*." Cert. Opp. at 2. In her view, applying *Westover* would make the debate over intent irrelevant. *See* Cert. Op. at 11. And indeed the debate would have been irrelevant, had the Missouri court followed that path. But it chose another course, never finding the coercion that is at the heart of *Westover*.

Westover was interrogated by police officers over the course of about fourteen hours, without ever being advised of his rights. *Miranda v. Arizona*, 384 U.S. at 494-495. Then he was turned over to FBI agents who continued to interrogate him without "an articulated waiver of rights." *Id.* Accordingly, despite some evidence of warnings, this Court concluded that it could not assume that Westover had intelligently waived his constitutional rights. *Id.* Thus *Westover* involved a "prior statement" that was "actually coerced." *See Oregon v. Elstad*, 470 U.S. at 310; *Miranda v. Arizona*, 384 U.S. at 496-497 (confession was the result of "pressure" applied by local police officers in "compelling surroundings").

Respondent correctly notes that "[t]he Missouri Supreme Court never found that respondent's first statement was voluntary" (Cert. Opp. at 11), the critical question under *Westover* and *Elstad*. No one here disputes that *Westover* would apply if the Missouri court had concluded that the first, pre-*Miranda* confession was actually coerced. The key to understanding this case is to recognize the significance of the Missouri court's failure to determine whether respondent's first statement was coerced.

The contrast between the facts here and those in *Westover* highlight the difficulty that the Missouri court would have faced in finding actual coercion. Seibert was arrested at the hospital (where she was with her son), transported to the police station, questioned for about forty minutes, given a fifteen- to twenty-minute break, and then carefully advised of her *Miranda* rights. Petition App. at A3. The initial questioning was conducted in low, conversational tones, without any threats of any

kind. Petition App. at A3, A16-A17, A21-A26. Seibert's pre-*Miranda* confession was not, "when judged side-by-side with the facts in *Westover*, clearly involuntary." Cert. Opp. at 11. Facing a more difficult set of facts, the Missouri court chose to avoid deciding whether there was actual coercion, instead preempting the *Elstad* analysis by inquiring into intent.

4. On the very day this petition was filed, the Court granted the petition in another *Miranda* case, *Fellers v. United States*, No. 02-6320. *Fellers* poses a question closely related to the one posed here, but the differences merit separate consideration.

Fellers was questioned after indictment, without being given his *Miranda* warnings. The first question he presents is whether the pre-warning, post-indictment interrogation violated his Sixth Amendment right to counsel. *See* Petition for Writ of Certiorari, No. 02-6320, at i; Brief of the United States in Opposition, No. 02-6320, at I. The Eighth Circuit held that it did not because Fellers was not "interrogated." *United States v. Fellers*, 285 F.3d 721, 724 (8th Cir. 2002). The second question is whether that alleged Sixth Amendment violation impermissibly taints later, post-warning, voluntary statements. Petition, No. 02-6320 at i; Cert. Opp., No. 02-6320, at I; *see* 285 F. 3d at 724.

Like Fellers, Seibert was questioned in two steps. But unlike Fellers, Seibert has not asserted a violation of her Sixth Amendment right to counsel. Nor could she; at the time of the initial questioning, she had not been indicted, nor had criminal proceedings otherwise been initiated against her.

A holding that Fellers' Sixth Amendment rights were violated would not dispose of any issue in this case. Nor would a decision that the exclusionary "fruits" doctrine applies after a Sixth Amendment violation. This Court has rejected the premise that a violation of every *Miranda*-related constitutional right "breed[s] the same irremediable consequences." *Oregon v. Elstad*, 470 U.S. at 309. *See Dickerson v. United States*, 530 U.S. at 441 ("refusing to apply the traditional 'fruits' doctrine developed in Fourth Amendment cases . . . recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment."). To apply to the Fifth Amendment context of this case the holdings that Fellers seeks in his Sixth Amendment case would require additional analytical steps – steps that merit independent consideration by the Court.

Recently, the Court granted the petition in another *Miranda* case, *United States v. Patane*, No. 02-1183. The Tenth Circuit's analysis in *Patane* began with a broader question – one relevant here: the extent to which *Elstad* survived *Dickerson*. *United States v. Patane*, 304 F.3d 1013, 1019 (10th Cir. 2002). But the question on which certiorari was granted goes to the Tenth Circuit's later conclusion that even in *Elstad*, this Court had permitted a distinction between subsequent statements and physical evidence. 71 U.S.L.W. 3555 (Feb. 25, 2003). *See* 304 F.3d at 1021.

Again, here we ask whether the holding of *Elstad* permitting use of a statement made after an unwarned statement applies regardless of the subjective intent of the officer doing the questioning. The United States asks in *Patane* whether *Elstad* applies to physical evidence to

which the unwarned statement leads. The answer to one question will not provide an answer to the other.

CONCLUSION

For the reasons stated above and in the Petition, the Court should grant the Petition and resolve the dispute among the courts as to whether subjective intent should be added to the *Elstad* analysis.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General
JAMES R. LAYTON
State Solicitor
Counsel of Record
Shaun Mackelprang
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-0774
Counsel for Petitioner

May 2, 2003

(5)

Supreme Court, U.S.
FILED
AUG 14 2003
OFFICE OF THE CLERK

No. 02-1371

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,
Petitioner,

v.

PATRICE SEIBERT,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

JOINT APPENDIX

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
KAREN K. MITCHELL*
Chief Deputy Attorney General
JAMES R. LAYTON
State Solicitor
SHAUN J MACKELPRANG
KAREN P. HESS
Assistant Attorneys General
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-0774

Counsel for Petitioner

AMY M. BARTHOLOW
Asst. Public Defender
3402 Button Wood Dr.
Columbia, MO 65201
Phone: (573) 882-9855
Fax: (573) 875-2594

Counsel for Respondent

* Counsel of Record

PETITION FOR CERTIORARI FILED MARCH 10, 2003
CERTIORARI GRANTED MAY 19, 2003

751

TABLE OF CONTENTS

Page

Notice of omitted opinion 1

Relevant Docket Entries 2

Defendant Seibert's Motion to Suppress Statements 4

Defendant's Motion for Judgment of Acquittal, or in the Alternative, Motion for New Trial 6

Transcript of Proceedings:

Suppression hearing 11
Testimony of Richard Hanrahan
Direct Examination 14
Cross-examination 24

Excerpts from the trial testimony of state's witness Richard Hanrahan, including defendant's renewed objection to the admission of her statement to police.
Direct Examination 41
Defendant's objection 42
Direct Examination continued 42
Cross-examination 51

State's Exhibit 37, *Miranda* warning and waiver form executed by Defendant Seibert 63

State's Exhibit 43, transcript of defendant's statement to the police on February 17, 1997 . 65

The opinion of the Missouri Supreme Court, filed December 10, 2002, has been omitted in the printing of this joint appendix because it appears on pages A1-A26 in the appendix to the Petition for Certiorari.

RELEVANT DOCKET ENTRIES

February 17, 1997	Charges filed against Defendant Seibert in the Circuit Court of Phelps County, Missouri, Criminal Division, Case No. CR397-0238FX.
April 21, 1997	Defendant's Motion to Suppress Statements filed.
August 11, 1997	Change of venue to the Circuit Court of Pulaski County, Missouri, Criminal Division, Case No. CR597-1327FX.
February 10, 2000	Suppression hearing held, and motion to suppress denied. [no docket entry made by the Pulaski County Circuit Court; see Trial Transcript, pp. 1, 45]
March 28, 2000	Defendant found guilty of murder in the second degree.
April 20, 2000	Defendant's Motion for New Trial filed.
June 8, 2000	Defendant's Motion for New Trial denied; judgment and sentence entered.
June 19, 2000	Defendant's Notice of Appeal filed in the Circuit Court.
June 23, 2000	Defendant's Notice of Appeal filed in the Missouri Court of Appeals, Southern District, Case No. SD23729.

January 30, 2002	Opinion affirming the judgment of the trial court.
February 14, 2002	Appellant Seibert's Motion for Rehearing or Transfer to the Missouri Supreme Court filed.
February, 28, 2002	Appellant's Motion for Rehearing or Transfer to the Missouri Supreme Court overruled and denied.
March 14, 2002	Appellant's Application for Transfer filed in the Missouri Supreme Court, Case No. SC84315.
April 23, 2002	Appellant's Application for Transfer sustained, and cause ordered transferred to the Missouri Supreme Court.
December 10, 2002	Opinion of the Missouri Supreme Court reversing the judgment of the trial court and remanding for a new trial.
March 10, 2003	Petition for Writ of Certiorari filed.
May 19, 2003	Certiorari granted.

IN THE ASSOCIATE CIRCUIT COURT
IN AND FOR THE COUNTY OF PHELPS
STATE OF MISSOURI

STATE OF MISSOURI,	)	
Plaintiff,	)	Cause No. CR397-238F
	)	
v.	)	Division No.
	)	
PATRICE SEIBERT,	)	
Defendant.	)	

MOTION TO SUPPRESS STATEMENTS

COMES NOW defendant, Patrice Seibert, by and through counsel, and moves this honorable court to suppress evidence of the statements taken from defendant by law enforcement agents which defendant believes the state intends to introduce into evidence against her. The statements were obtained in violation of defendant's rights against self-incrimination, right to counsel, and due process of law as guaranteed by Article I, sections 10, 18(a) and 19 of the Missouri Constitution and the Fifth, sixth and 14th Amendments to the United States Constitution. As grounds, defendant states:

1. Defendant's statements were not voluntary in that, the length of defendant's custody, the nature of defendant's interrogation, and the conditions under which it was conducted were inherently coercive as applied to person of defendant's education, background, and physical and mental condition at the time such interrogation occurred and that defendant was subjected to mental and physical duress prior to and during the interrogation.

2. Defendant's statements were made without the defendant first being advised of her constitutional rights, to wit:

(a) Defendant was not advised in clear and unequivocal terms of her right to remain silent prior to her interrogation;

(b) Defendant was not advised that anything she said could and would be used against her in court;

(c) Defendant was not advised of her rights to consult with a lawyer and to have a lawyer present with her during the interrogation;

(d) Defendant was not advised that a lawyer would be appointed for her if she was indigent; and

(e) Defendant did not knowingly and intelligently waive her right to remain silent, her right to counsel, or her right to have counsel appointed for her.

3. Any alleged statements were the result of an unlawful arrest in violation of defendant's rights under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and Article I, Section 15 of the Missouri Constitution.

WHEREFORE, defendant moves this court to suppress any evidence concerning any oral, written or recorded statements to have been made to law enforcement officials or other witnesses in connection with this case, for a hearing, and for such other relief as this court deems just and proper.

Respectfully submitted,

/s/ Ruth Schulte
Ruth Schulte, Mo Bar No. 40670
Attorney for Defendant
505 E. Elm
Ste. 102
Lebanon, MO 65536
Phone 417-532-6886
Fax 417-532-6894

[Certificate of service omitted in printing]

IN THE C UIT COURT OF PULASKI COUNTY
STATE OF MISSOURI

STATE OF MISSOURI,	)	Cause No.CR597-
	)	1327FX
Plaintiff,	)	
	)	Division No.
v.	)	
	)	
PATRICE D SEIBERT,	)	
Defendant.	)	
	)	

MOTION FOR JUDGMENT OF ACQUITTAL, OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

Comes now defendant, Patrice Seibert, by her attorneys, and pursuant to Missouri Supreme Court Rules 27.07, 28.03 and 29.11, and all other applicable rules, respectfully moves for a judgment of acquittal, or in the alternative, a new trial. As grounds for this motion, defendant states the following:

1. The trial court erred in overruling and denying defendant's Motion to Suppress Statements. Defendant filed this motion pretrial, on the grounds that the oral statements and the subsequent audio tape recording of it were obtained in violation of defendant's rights. It was not a voluntary statement, defendant did not intelligently and knowingly waive her right to counsel, and defendant was induced to make said statements based upon pretext. The manner in which the statements were obtained was inherently coercive: defendant made said statements while under extreme emotional disturbance and was subjected to psychological duress during said interrogation.

In the early morning hours of February 17, 1997, defendant was awakened from her sleep in a waiting room at St. John's Mercy hospital in St. Louis County, Missouri and arrested on charges of Murder first degree and Arson first degree. Defendant had been living at the

hospital while her son was there as a patient in the burn unit. Rolla police officer Richard Hanrahan and Missouri state fire Marshall Roger Windle, along with St. Louis County police officer Kevin Clinton made the arrest of defendant at the hospital. At both the pretrial hearing on the motion to suppress statements (2/10/2000), and at trial, officer Hanrahan testified that officer Clinton had been specifically instructed by officer Hanrahan and fire Marshall Windle not to advise defendant of her rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) while transporting her to the St. Louis County police department in Clayton, Missouri. Instead, while driving defendant to the police station, officer Clinton instructed defendant to carefully consider what she was going to say when Hanrahan and Windle interviewed her, never giving her the information that she had the right to remain silent. At the police station in Clayton, officer Hanrahan testified that he and Windle made the decision not to advise defendant of her rights until after they obtained statements from her. At the hearing on the motion to suppress statements, officer Hanrahan testified that this is a deliberate strategy he employs in order to obtain confessions and that he has been trained in this technique. Hanrahan testified at the hearing on the motion to suppress statements that he knew defendant's first "confession" could not be admitted into evidence at trial because of the lack of Miranda warnings, but he believed the same "confession" repeated on an audio taped recording after administering Miranda warnings to defendant was admissible in a court of law. He further testified at the hearing on this motion, that defendant was in custody, was under arrest and was not free to leave. It was only after the officers obtained admissions of guilt from defendant that they advised her of her rights and had her sign a waiver of her rights and make an audio tape recording of her statement. This method of interrogation constitutes a Due Process violation and any subsequent statements should have been suppressed. State v.

Miller, 894 S.W.2d 649 (Mo. banc 1995), Florida v. Ramirez, 739 So.2d 568 (Fla. 1999), Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 714 (1977). The subsequent statement or "confession" by defendant constitutes "fruit of the poisonous tree." It is tainted by the illegal method in which the first "confession" was obtained, and advising defendant of her rights pursuant to Miranda does not remove the taint. Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963); United States v. Robinson, 932 F.Supp. 1271, 1280 (D.N.M. 1996). The ruling of the trial court resulted in a violation of defendant's rights to Due Process, Equal Protection and reliable sentencing as well as those rights guaranteed by the 4th, 5th, 6th, 8th and 14th Amendments to the United States Constitution and Articles 1 and 2, sections 2, 10, 18(a) 19 and 21 of the Missouri Constitution.

2. The trial court erred in overruling defendant's objections to and admitting into evidence state exhibits 42 and 43. This is the audio taped statement of defendant taken by officer Hanrahan and an accompanying typed transcript of the taped statement. Defendant incorporates by reference all of the arguments and points of law submitted in point 1 of this Motion for New Trial. Defendant renewed her objections to the admission into evidence of her February 17, 1997 statements to police. For all of the reasons contained in point 1 of this motion, state exhibits 42 and 43 should have been excluded. The ruling of the trial court resulted in a violation of defendant's rights to Due Process, Equal Protection and reliable sentencing as well as those rights guaranteed by the 4th, 5th, 6th, 8th and 14th Amendments to the United States Constitution and Articles 1 and 2, sections 2, 10, 18(a) 19 and 21 of the Missouri Constitution.

3. The trial court erred in admitting into evidence over the objections of defendant, state's exhibit 37. Defendant's objection to the admission of this piece of evidence was made pursuant to the pretrial Motion to

Suppress statements, heard on February 10, 2000. This was the warning and waiver form signed by defendant and officer Richard Hanrahan after defendant had given Hanrahan a statement without benefit of Miranda warnings. Defendant incorporates by reference the entire contents contained in points 1 and 2 of this motion and argues that this piece of evidence along with the taped statements of defendant should have been suppressed and excluded from the trial. The ruling of the trial court resulted in a violation of defendant's rights to Due Process, Equal Protection and reliable sentencing as well as those rights guaranteed by the 4th, 5th, 6th, 8th, and 14th Amendments to the United States Constitution and Articles 1 and 2, sections 2, 10, 18(a) 19 and 21 of the Missouri Constitution.

* * *

All of the matters listed within this motion are cited to the Court as violations of defendant's rights to Due Process, Equal Protection, fairness and reliability in sentencing, effective assistance of counsel and all of her rights guaranteed by the 4th, 5th, 6th, 8th, and 14th Amendments to the United States Constitution and Articles 1 and 2, sections 2, 10, 18(a) 19 and 21 of the Missouri Constitution.

Respectfully submitted,

/s/ Beth Davis-Kerry
Beth Davis-Kerry, Mo Bar No. 36867

/s/ Delores Berman
Delores Berman, Mo Bar No. 40054
Attorneys for Defendant
Shell Bldg Ste. 410
1221 Locust Street
St. Louis, MO 63103
Phone 314-340-7662
Fax 314-340-7666

[Certificate of service omitted in printing]

APPELLANT'S TRANSCRIPT ON APPEAL
NO. 23729-1
IN THE
MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

[Filed March 23, 2001]

STATE OF MISSOURI	)	
	)	
Plaintiff-Respondent,	)	In the Circuit Court of
	)	Pulaski County,
	)	Missouri
vs.	)	
	)	Case No. CR597-
	)	1327FX
PATRICE SEIBERT,	)	
	)	VOLUME ONE
Defendant-Appellant.	)	

APPEAL from the Circuit Court of Pulaski County, Missouri,

Honorable DOUGLAS E. LONG, JR., Judge

---

* * * * * * * *

[TRANSCRIPT OF SUPPRESSION HEARING]

[1] February 10, 2000

THE FOLLOWING PROCEEDINGS were held on Thursday, February 10, 2000, before the Honorable DOUGLAS E. LONG, JR., Judge of Division I of the 25th Judicial Circuit of Missouri, at Rolla, Phelps County, Missouri.

MR. ROBERT J. AHSENS III, Assistant Attorney General, of Jefferson City, Missouri, appeared for the

Plaintiff, STATE OF MISSOURI.

MS. BETH A. DAVIS-KERRY, MS. DELORES BERMAN and MR. DAVID A. BRUNS, Assistant Public Defenders, of St. Louis, Missouri, appeared with the Defendant, PATRICE SEIBERT.

oOoOo

THEREUPON, the Defendant appearing in person and with her attorneys, the following proceedings were held at 2:44 p.m. of said date out of the presence and hearing of a jury:

* * *

[2]

THE COURT: Yes, it's pretty well done. We're going to have to have the motion to suppress. She asked us - - she said there was something done at a preliminary hearing.

MS. DAVIS-KERRY: It had been taken up at the preliminary hearing.

THE COURT: Well, . . .

MS. DAVIS-KERRY: And it was going to be my request to the Court that I be granted leave to do . . .

THE COURT: You can readdress those.

MS. DAVIS-KERRY: . . . a motion to suppress on behalf **[3]** of my client.

THE COURT: Absolutely.

MS. DAVIS-KERRY: Okay.

MR. AHSENS: I'm willing to take that matter up today.

THE COURT: We're ready. What other motions do you have that you want to argue this afternoon?

MS. DAVIS-KERRY: That would be the only evidentiary motion.

THE COURT: All right.

MS. DAVIS-KERRY: And then my legal motions that are contained - - there was a motion to suppress evidence in this matter and I don't believe there was any evidence seized from my client.

MR. AHSENS: Not from her person - - no.

MS. DAVIS-KERRY: And we're talking about

evidence taken from the trailer.

MR. AHSENS: Well, I think there were items such as a gas can that was found at the trailer - things of that sort, . . .

MS. DAVIS-KERRY: Right.

MR. AHSENS: . . . but by the same token, it was part of the fire scene.

MS. DAVIS-KERRY: Right - - I don't expect to be arguing the motion to suppress evidence, Your Honor. There **[4]** may be some pretrial motions in limine regarding certain bits and pieces that were taken from the trailer, but not pursuant to a motion to suppress.

THE COURT: When is your trial scheduled?

MS. DAVIS-KERRY: March 23rd.

MR. AHSENS: March 23rd.

THE COURT: Okay.

MS. DAVIS-KERRY: And no - - I won't change with Ruth.

THE COURT: You saw where I was going with that one.

MR. AHSENS: I was going to lay in the weeds because I kind of wondered how you were going to react to that.

THE COURT: You saw where I was going with that one and no - - I won't change with her. This is my client. All right. On the motion to suppress statements, are you ready to call your first witness?

MR. AHSENS: Yes, Your Honor.

THE COURT: You may call him.

MR. AHSENS: The State calls Richard Hanrahan.

THE COURT: Come forward, Officer. Is it still Officer? Yes, it is. Raise your right hand please and be sworn.

RICHARD EDWARD HANRAHAN, being sworn by the Deputy Clerk, testified as follows:

[5] THE COURT: Take the stand please.

THE WITNESS: (Complies)

THE COURT: You may inquire, Mr. Prosecutor.

MR. AHSENS: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. AHSENS:

Q Sir, would you tell the Court your full name please?

A Richard Edward Hanrahan.

Q What do you do for a living, Mr. Hanrahan?

A I'm a commissioned police officer for the City of Rolla.

Q And what are your duties with the Rolla City Police?

A I'm a Criminal Investigator. I'm a Supervisor in the Criminal Investigation Unit.

Q Were you performing similar duties, sir, on February 12th, 1997?

A At that time, I was the Criminal Investigator, sir.

Q Okay. With that in mind, sir, did you become involved in the investigation of a trailer fire which resulted in the death of one or more persons at No. 4 Marlette here in Rolla, Missouri, on that date?

[6] A Yes, sir, I did.

Q And how did you first become involved?

A I was first made aware of the fire by Captain Day at the time - - he's a Lieutenant now - - who instructed me to go to the hospital and speak to two subjects who had received some injuries from the fire and were being. treated there.

Q All right. And those two subjects were whom?

A Darian Seibert and Derrick Roper.

Q Did you have occasion, sir, during your visit at the hospital to come into contact with a person you either knew or later became known to you as Patrice Seibert or Seibert?

A Yes, I did.

Q And where was it you came into contact with her?

A In the emergency room.

Q And what was your purpose in contacting her there?

A Actually, she contacted me first - - asked me if I had any news from the fire and told me who she was. I took her to a conference room because I had learned that there were bodies in the fire but I didn't know who they were and I wanted to get more information before I tried to tell her anything.

[7] Q Did - - so at this time, you had some conversation with Patrice Seibert and elicited some information from her. I'm not concerned with the contents of that, but you did have a conversation with her.

A Yes, sir.

Q In the course of this conversation, sir, did you at any time place Patrice Seibert under arrest?

A No, sir.

Q Did you detain her for any purpose other than just to take her aside and talk with her?

A No, sir.

Q And was - - when you spoke with her, sir, after you were finished, where did Ms. Seibert go - - if you know?

A I really don't know for sure. I assume she probably went to St. Louis. I believe her other son was flown there that night or taken there.

Q So after your discussion with her, she remained at liberty.

A Oh, yeah.

Q Did you have occasion to speak with Ms. Seibert again after that particular conversation?

A Yes, I did.

Q And just for the record, so we are clear, is Ms. Seibert present in the courtroom today?

A Yes, sir, she is.

[8] Q Would you point her out please and tell us what she's wearing?

A Okay. She's the lady second from the end closest to me at the table. She's wearing the orange

jumpsuit.

MR. AHSENS: Your Honor, I'd ask that the record reflect the witness has identified the Defendant.

THE COURT: The record will so reflect.

MR. AHSENS: Thank you.

Q (By Mr. Ahsens) When was it you next came into contact with Patrice Seibert?

A I believe it was the 14th of that month.

Q So this would have been two days after the fire.

A I believe so.

Q And what was your purpose in contacting her at that time?

A Myself and Day went up and interviewed her at the hospital.

Q You say Day - - is this - - who is Day?

A Lieutenant Day now.

Q I'm sorry - - thank you.

A That's okay.

Q And what was the purpose of your contact, sir?

A We basically apprised her of the evidence we **[9]** were finding and our concerns that there may have been some foul play on the part of her son and Derrick.

Q Derrick Roper?

A That's correct.

Q And at that time, did you take Ms. Patrice Seibert into custody or place her under arrest?

A No, sir.

Q And was the - - what was the - - was the purpose then of your conversation simply to elicit information or to provide information to her?

A Both, sir.

Q And did you then proceed to have a conversation with her wherein you provided information and gathered more information from her?

A Yes, we did.

Q And after the conclusion of that conversation, where did Ms. Seibert go - - if you know?

A I assume back upstairs to the burn unit.

Q All right. Would it be - - and where did this

conversation taken place, sir?

A At St. John's Hospital in St. Louis.

Q And was - - would it be fair to say then, sir, that Ms. Seibert remained at liberty after your brief conversation with her at that time?

A Yes, sir.

[10] Q Sir, with regard to Ms. Seibert, did you have yet another conversation with her?

A Yes, I did.

Q And when and where did that take place - - if you can tell us?

A It was the early morning hours of the 17th - - that would have been myself and Rodger Windle and Patrice.

Q When you say Patrice, you mean the Defendant here in this courtroom.

A Yes, sir, I do.

Q And you say Rodger Windle - - who is he - - just for the record?

A He's a Fire Marshall for the State of Missouri.

Q What was the purpose of your contacting Ms. Seibert at that time?

A We had her arrested at our request by a Detective with the St. Louis County Police and we conducted an interrogation after the arrest.

Q Where did that interrogation take place?

A At the St. Louis County Police Department's offices in Clayton, Missouri.

Q Did you participate in the actual arrest or was Ms. Seibert simply brought to you in custody?

A I was present at the arrest. I introduced Detective Clinton to her and he identified himself and he **[11]** placed her under arrest.

Q Did you then speak to her at that time or would you wait for some purpose?

A Very briefly.

Q What was the purpose of that brief conversation, if any?

A I believe she said she didn't know what this was

about and I told her - - "Yeah, I think you do. You need to think about it on the way down to where we're going to talk." - - or words to that effect.

Q Was that the sum and substance then of your conversation with her?

A Yes, sir.

Q Did you transport Ms. Siebert to the St. Louis County Police Department or was she transported by others?

A She was transported by Detective Clinton.

Q When you arrived at the St. Louis County Police Department, did you - - you say you spoke with her at that location. Can you describe the room or surroundings in which that conversation took place?

A A very small interview room. You'd be pushing to get two tables like the table you're sitting at into it.

Q All right. So you're describing - - was there sufficient room for you and Ms. Seibert to sit in this room?

A Oh, yes.

[12] Q Was there a table between you?

A There was a table that was along the wall so that basically she sat at the end of the table and I was at the corner of the edge of the table.

Q Was there anyone else in the room with you at the time?

A Mr. Windle was.

Q All right. So at the time then, did you then proceed to interview or interrogate Ms. Seibert?

A Yes, we did.

Q Before - - was this interview or interrogation recorded in any fashion?

A Not at that point.

Q All right. At this point, did you, in fact, apprise Ms. Seibert of her rights?

A Not at that point - - no, sir.

Q So you just - - you simply discussed things without having done so.

A That's correct.

Q Following that discussion, did you then apprise Ms. Seibert of her rights?

A Yes, I did.

Q And did you then proceed to interview her again?

A Yes, I did.

[13] Q And how was it that you apprised Ms. Seibert of her rights?

A I read her her rights from a preprinted form that was provided by Detective Clinton.

Q And do you have a copy of that form with you?

A Yes, sir, I do.

Q Would you get it out please?

A Sure.

MR. AHSENS: For the purpose of this hearing, counsel, I would ask to use a copy rather than the original.

MS. DAVIS-KERRY: No objection.

THE COURT: Okay.

MR. AHSENS: Your Honor, I'm simply going to refer to this as the Waiver form, rather than have it marked.

THE COURT: All right.

Q (By Mr. Ahsens) Sir, I'm going to show you what we're referring to as the Waiver form and ask you if you can tell me what this is?

A Okay. This is a photostatic copy of the Waiver form that I used that night when I read Ms. Seibert her rights.

Q And does that reflect, sir, the acknowledgment on the part of Ms. Seibert as to understanding her rights as you read them?

A Yes, sir, it does.

[14] Q And how is that indicated?

A By her signature under a waiver paragraph and the date and time.

Q And does that also, sir, show some acknowledgment beside each of those rights of her understanding of each of them?

A Yes, sir - - each of the rights is check-marked by

me as I read them and then initialed by her.

Q And did you ask her to initial that to demonstrate any particular understanding?

A Yes, sir - - that she understood each of the rights I had read her.

Q And did she indicate to you that - - verbally and by placing her initials there that she did understand them?

A Yes, sir.

Q Did you then read the waiver and ask her if she were willing to waive her rights and speak with you?

A I don't know if I actually read the waiver to her. I'd have to look back at the transcript - - it's been a long time, but this is tape recorded.

Q All right, sir. And was - - but was that made available to her and did you ask her if she were willing to waive the rights as you had read them to her and speak with you?

[15] A Yes, sir.

Q And did she agree to do so?

A She did.

Q And did she do that verbally as well as signing the form?

A I believe she did - - yes, sir.

Q And does her signature appear on this document?

A Yes, sir, it does.

Q Would you, sir, by pointing, indicate her signature to the Court?

A It would be right here, sir.

Q And did you see her place her signature on the document?

A Yes, I did.

Q And did you and other officers who were present place your signatures on the document as witnesses thereto?

A Myself and Fire Marshall Windle also signed it.

Q And does Sergeant - - Fire Marshall Windle's signature - - did you see that placed on this document?

A Yes, sir, I did.

Q And that is your signature there as well.

A Yes, sir, it is.

MR. AHSENS: Do you wish to see it again, counsel?

MS. DAVIS-KERRY: No, thank you.

MR. AHSENS: I offer the Waiver, Your Honor.

[16] THE COURT: Admitted.

Q (by Mr. Ahsens) Did you then proceed to talk with Ms. Seibert?

A Yes, sir, I did.

Q And did she, during this conversation, provide you with information concerning the fire at No. 4 Marlette and the death of one Donald Rector?

A Yes, sir, she did.

Q And did she - - in addition to that, sir, at any time during your conversation, did she stop the conversation or seek to invoke any of the rights you had read to her?

A No, sir, she did not.

Q And sir, then, as you say, this conversation was recorded.

A That's correct.

Q And was that recording then, sir, placed in evidence?

A Yes, sir.

Q And a transcript prepared.

A That's correct.

Q This room that you were in - - the three of you - - during your conversation, were you or Office Windle armed?

A I honestly don't recall, sir, if I was wearing my sidearm or not.

Q Did you produce that sidearm and show it to the [17] Defendant?

A Oh, no, sir, I wouldn't have done that.

Q Did you threaten her in any way - - . . .

A No, sir.

Q . . . either physically or verbally?

A No, sir. In fact, we used very low conversational

tones in talking to her.

Q In the course of your conversation with her, sir, did you offer her any inducement or promise her anything in order to induce her to speak with you?

A I did not.

Q Did Officer Windle do so?

A No, sir.

Q Were you present during the entire conversation?

A No, sir, I wasn't.

Q Did Ms. Seibert indicate to you - - or pardon me, I believe it's pronounced Ms. Seibert. Did Ms. Seibert indicate to you that she was relying upon any promise?

A No, sir.

Q So with - - you say that there was a time when you were not present. Could you describe what that was about - - what happened then?

A Yes, sir - - I had left the room and gone to the room where Detective Clinton was - - where he was observing - - **[18]** and observed from there for awhile and then I returned.

Q So you were actually observing then the further conversation that took place after you left the room.

A That's correct.

Q And could you hear that conversation as well?

A Yes, sir.

Q And did you hear Officer Windle make any promises to the Defendant or any threats to her?

A No, sir.

Q Thank you. At the conclusion of this particular statement, is the Defendant placed under arrest?

A She had already been arrested – yes, sir.

Q Was she then taken into custody and processed?

A Detective Clinton did that – yes, sir.

Q Did you have any further conversation with her at that time?

A Yes, I did.

Q And when was that?

A Immediately after the interview – the

interrogation.

Q And was that something that was done verbally - - I mean, just a conversation back and forth with you?

A That's correct.

Q Where did that conversation take place?

A In the same room.

[19] Q Was that conversation recorded?

A No, sir.

Q What was - - how long did that subsequent conversation last?

A It wouldn't have been very long. The basic gist of the conversation was she told me that she didn't feel like she had a right to live and alluded to the fact that she wanted to harm herself.

Q And did you pass that information on to officers in order to see to it that she was watched?

A I specifically told Detective Clinton.

Q Did you after that time have any further contact with the Defendant, Patrice Seibert?

A I believe there was one day when I was asked by Ms. Slawson with the DFS to go with her to try to conduct an interview a few days later and I did go, but I was told that she had an attorney and didn't wish to speak to me, so nothing was said.

Q So there was not another conversation you - - but Ms. Slawson is whom - - just for the record?

A She's a caseworker for DFS - - Division of Family Services.

Q And there was some concern there, was there not, because of DFS's interest in the deceased son of Patrice Seibert, Jonathan Seibert?

[20] A Yes, sir.

Q All right. In that regard, sir, do I understand you then to be telling us that there was no conversation at that time?

A No, there was not.

Q Have you had any other conversations with Patrice Seibert at any other times?

A No, sir.

Q Have we now discussed each and every contact you have had with her?

A I believe we have - - yes, sir.

MR. AHSENS: I have nothing further of this witness. You may inquire.

THE COURT: Defense counsel?

oOoOo

CROSS EXAMINATION

BY MS. DAVIS-KERRY:

Q On February 12th, 1997, the day of the fire, you stated that you had gone over to the Phelps County Regional Medical Center.

A Yes, ma'am.

Q All right. And you said that my client, Patrice Seibert, contacted you first, or . . .

[21] A That's correct.

Q . . . initiated the contact.

A She walked . . .

Q Describe - - . . .

A I'm sorry.

Q . . . describe that for me please.

A She walked out of a treatment room where her son - - or a treatment bay where her son and Derrick Roper were being treated and asked me - - "Are you a police officer?

Q And were you wearing a badge or some sort of uniform to indicate that you were a police officer?

A I was in civilian clothes, but I don't know if I had my jacket on. My badge and weapon might have been visible, or I may have been wearing the pocket badge that I have on now - - I don't recall.

Q All right. Did you know my client before this date in February of 1997?

A No, ma'am.

Q All right. Did you know either of the two other co-Defendants, Derrick Roper or Darian Seibert?

A I had had dealings with Derrick Roper. I had

heard Darian's name.

Q All right. But you did not know Darian Seibert.

A No, ma'am.

[22] Q And you stated that my client asked you if you were a police officer. Can you describe for me the rest of that conversation on February the 12th, of 1997?

A Certainly not word for word, but basically she was asking what had happened - - what could I tell her. When we talked in the conference room, . . .

Q Let me interrupt you if I may. Do you recall specifically what my client was asking you?

A I just recall that she was asking what had happened.

Q All right.

A And I do believe that she asked me if everyone got out or if anybody was hurt and I don't recall the exact words she used.

Q Okay. Anything else on that day?

A Well, yes - - I was the one that had to tell her that Jonathan appeared to have died in the fire.

Q All right.

A Along with Donald.

Q Okay. And her reaction at that time was what?

A She cried - - she appeared to be very distraught.

Q And anything else in that February 12th, 1997, meeting?

A No, ma'am.

[23] Q All right. Let's move on then. I'd like to talk to you about February 14th. By this time, Darian Seibert had been transported up to St. John's Hospital in St. Louis County - - correct?

A That's correct.

Q All right. And you had information that that's where Patrice was.

A Yes, ma'am.

Q And so you and - - was it Captain Day at the time?

A Yes, ma'am.

Q Went up and conducted that interview on

February 14th, of 1997.

A I believe that was the date. I'm ninety percent positive. I could check my reports if you'd like me to.

Q. All right. No, I don't need you to do that at this time. You tape recorded that interview - - correct?

A That's correct.

Q Okay. Now at that time, if I understand what you said the other day, my client was not a suspect.

A That's correct.

Q Okay. But you weren't ruling her out as a suspect at that time, were you?

A I don't know if I had ruled anybody out, other **[24]** than the people who didn't live through the fire.

Q All right. But on the February 14th, 1997, interview in which you tape recorded it, do you recall asking my client if she had been involved?

A Oh, absolutely.

Q All right. Do you recall asking her whether or not she had done anything about putting gasoline inside the trailer?

A Certainly - - we needed to ask that for the record.

Q All right. So you did ask her things that you would ask of somebody who might be a suspect - - correct?

A Certainly.

Q And you tape recorded that.

A Yes, ma'am.

Q All right. And you didn't go through any sort of what we call Miranda warnings or the warning that you read here in Court today on February 14th, did you?

A No, ma'am.

Q All right. Now on February 17th, you make arrangements with the St. Louis County Police Department to arrest my client there at St. John's Hospital in St. Louis County.

A Yes, ma'am.

Q All right. And you do this - - it's actually **[25]** the very early morning hours of February 17th, isn't it?

A That's correct.

Q She's arrested about - - what - - 3:00 in the morning?

A It was about 3:00 - - yes.

Q You make arrangements with a St. Louis County Officer Kevin Clinton to make the arrest there at the hospital.

A Yes, ma'am.

Q All right. So you had some conversation with Kevin Clinton prior to the arrest of my client there at St. Johns - - correct?

A Yes, ma'am.

Q All right. And part of that conversation with Kevin Clinton is where you're telling him your theory of the case and you now believe Patrice is a suspect or a conspirator in this fire and the murder of Donald Rector.

A Yes, ma'am, I'm sure it was.

Q You tell him to - - you tell that to Kevin Clinton.

Q I'm sure I did - - yes.

A All right. And you have a plan for how you want to conduct the interview of Patrice on February 17th, don't you?

A Yes, ma'am.

[26] Q And you call it a two-stage interviewing process or a two-stage interrogation.

A Yes, ma'am.

Q All right. And I'm getting this information - - for the record, you testified in a Preliminary Hearing . . .

THE REPORTER: Excuse me - - Mr. Ahsens, could you please - - that comes through on the microphones real . . .

MR. AHSENS: I beg your pardon.

THE REPORTER: Thank you.

Q (by Ms. Davis-Kerry) You testified at the Preliminary Hearing in the case against my client, didn't you?

A Yes, ma'am.

MS. DAVIS-KERRY: All right. Your Honor, for the record, I'd ask the Court to take judicial notice of the

contents of Officer Hanrahan's testimony that would be contained within the Preliminary Hearing transcript.

THE COURT: Notice taken.

MS. DAVIS-KERRY: Thank you.

Q (by Ms. Davis-Kerry) In getting back to that, that's where I get the information. You are - - in that proceeding, you're talking about your intentional two-stage interrogation process - - correct ?

A Yes, ma'am, I'm sure I did.

Q All right. So after you filled Officer Clinton - - St. Louis County Officer Kevin Clinton in on your theory of **[27]** the case and your desire to have him assist you in arresting my client, you also tell him that you don't want him to question her and you don't want him to read her her rights - - is that correct?

A That's correct.

Q Okay. You specifically did not want him to read her her rights.

A That's correct.

Q All right. And when we talk about her rights, we're talking about the rights that you've recited here in Court - - also known as the Miranda rights.

A I don't know if I recited them here, but . . .

Q All right.

A . . . yes, ma'am.

Q Okay. Would these be the rights that are contained within the warning and waiver form that's been admitted as an exhibit in this matter?

A Yes, ma'am.

Q Okay. Officer Clinton is the one that transports my client from St. John's Hospital to an interrogation room there in St. Louis County - - correct?

A Yes, ma'am.

Q And that's when you and Fire Marshall Rodger Windle then take over the interview of my client.

A We waited fifteen to twenty minutes, but then **[28]** we went in and talked to her - - yes, ma'am.

Q Okay. And the purpose of waiting fifteen or twenty minutes was what?

A Let her settle down in the room - - . . .

Q All right.

A . . . give her a little time to think about the situation.

Q Did you tell Officer Clinton prior to the arrest of my client or perhaps prior to the actual start of your interviews with my client there in St. Louis County, that you believed she expected to be arrested and you believed she would have a story rehearsed?

A Yes, sir, I did - - I'm sorry - - yes, ma'am. I did. I apologize.

Q That's okay - - I've been called worse. Your reason for telling that to Officer Clinton was what?

A It's what I believed. I didn't see any reason not to tell him that.

Q Now there was a tape recording of your interview with my client on February 17th of 1997 - - correct?

A The second part of it - - yes, ma'am.

Q And that's the second stage of your interrogation technique.

A Yes, ma'am.

Q So in the first stage, you and the Fire Marshall **[29]** Windle interview my client and speak to her about the case.

A (Nods head yes)

Q You tell her - - you're nodding your head yes. Is that a yes?

A Yes, ma'am.

Q All right. You tell my client that you already know that she is - - what - - guilty or involved in this matter?

A Yes, ma'am.

Q All right. And you continue to tell - - well, let me get to this. Let me go back if I may - - and I apologize - - to your interview - - your taped interview with my client on February 14, 1997.

A Yes, ma'am.

Q All right. At that point, you're saying that you had not ruled her out as a suspect - - correct?

A That's true.

Q All right. And it's in that interview - - February 14th, of 1997, where you asked her if she had anything to do with the fire and/or the murder of Donald Rector. In that same interview, you also were providing her this information from you about your belief that no one intended to kill Donald - - you believed it was a fight that broke out.

A Yes, ma'am.

Q Okay. You told that to her on February 14th, **[30]** of 1997.

A I'd say it's one of many things we told her that day.

Q Okay. Now on February 14th, when you told her that you believed that this was as a result of a fight that broke out between Darian Seibert and Derrick Roper and possibly Donald Rector that resulted in Donald's death and the burning of the trailer, did you believe that to be the truth or was that a falsehood?

A I believed that was a good possibility.

Q Okay. At the time, you believed it.

A It was a theory.

Q It was a theory.

A Yes, ma'am.

Q All right. So you weren't just lying to her on February 14th.

A No, ma'am.

Q Now moving back if I could then to the February 17th matter, the information that is contained in the tape recording was largely a repeat of information that you and Fire Marshall Windle obtained from Patrice before turning the tape recorder on - - correct?

A That's correct.

Q All right. And in that first stage - - let's call that the first stage of the interrogation before the tape **[31]** recorder was turned on.

A Okay.

Q You interviewed her - - what - - some twenty minutes perhaps - - twenty to thirty minutes?

A I'd say that's probably accurate.

Q All right. And in that, you do not read her her Miranda rights, do you - - her rights to remain silent?

A No, ma'am, we didn't.

Q And that was a conscious decision on your part.

A Yes, ma'am.

Q Because you wanted to see what she was going to say.

A It's part of a tactic I've been trained in and used before, and yes, ma'am, that's the main reason you're doing it.

Q But you know that you are up there now. You have arrested someone - - correct - - or you have this person under arrest?

A Yes, ma'am.

Q And this person's not free to leave.

A No, ma'am, she's not.

Q And this person is in an interrogation room.

A That's correct.

Q And it is your full intent to go and interrogate this person.

[32] A Yes, ma'am.

Q All right. And gain some sort of confession or admission of guilt - - correct?

A That's our hope - - yes, ma'am.

Q And that's your intent.

A Absolutely.

Q All right. And it is also your conscious decision not to inform her of her rights under the law of Miranda - - the case law.

A Not at that point.

Q You say this is something you were trained in.

A Yes, ma'am.

Q Can you tell me about that training? Where were you trained in this form of interrogation?

A Let's see - - I believe the National Law Police Institute, who provides computer training to departments all over the country, has put this out numerous times. My department here subscribes to

their training. The departments I was with previously to coming here subscribe to it. I did produce training documents from them - - literature from them on this after the preliminary and I'd be happy to do it again.

Q Oh, all right. I'm sorry, I was not aware of that.

A That's okay.

Q Okay. Yes - - I would like to see those.

[33] A I don't have them with me, but I do have them at my office.

Q Understood.

MR. AHSENS: Counsel, if you'll provide the witness your address, I'm sure he can mail it to you directly.

MS. DAVIS-KERRY: Will do - thank you.

Q (By Ms. Davis-Kerry) How long ago were you trained in this sort of interrogation technique?

A Specifically, I couldn't tell you the exact dates. We take a monthly computer training and it's come up in it numerous times. I couldn't tell you which month or year the last one was.

Q When you say computer training, you mean training via the computer - - . . .

A That's correct.

Q . . . information that's coming over the computer.

A Well, a disc is sent to the department and it has scenarios for different basic training situations.

Q What do you understand the law on this matter to be?

MR. AHSENS: Objection - - what he understands the law to be is irrelevant.

THE COURT: Sustained.

Q (by Ms. Davis-Kerry) Within the training that **[34]** you've received in this two-stage interrogation technique, are you trained in any safeguards within the technique to weed out what we call volunteer or false confessions?

A Within that specific technique, I don't recall any. I have been trained in that. I've been to training in several other types of interview and interrogation.

Q What about - - did this training - - this

interrogation technique, does it take into account the state of mind of the person being interrogated?

MR. AHSENS: Your Honor, at this point - - and I don't want to cut this off entirely, but I'm going to object at this point. I think we're straying rather far afield from the issues in this particular motion.

THE COURT: Do you have some specific reason for inquiring in that area, ma'am?

MS. DAVIS-KERRY: Yes, I do, Your Honor.

THE COURT: You may continue.

Q (by Ms. Davis-Kerry) Does it take into account the state of mind of the person you're interrogating?

A I don't recall anything in it about the state of mind.

Q Part of this technique - - does it also include that you keep asking the same question until you get the answer you want?

A No, ma'am.

[35] Q All right. Because I noticed in the transcripts that there are times where you ask a question of my client and then she doesn't provide an answer - - or she gives you an answer but you ask the question again and she gives you the same answer she had previously given and you ask the question again until she changes her answer, and I'm wondering - - is that part of the technique that you're trained in?

A No, ma'am - - that's just basic question and answer.

Q To ask the same question over and over again until you get the answer you want.

MR. AHSENS: I'm going to object to her characterization, sir, of that particular process.

THE COURT: Overruled.

THE WITNESS: Not until I get the answer I want, ma'am - - until I get the answer that she's already provided once.

Q (by Ms. Davis-Kerry) Okay. So this was information that you had without the benefit of Miranda warnings to my client and then you go ahead and you

make a taped statement of the same information and that's when you provide the Miranda warning - - correct?

A Before the taped statement - - yes, ma'am.

Q But after the first stage of the interrogation.

[36] A Yes, ma'am.

Q And it's a conscious decision on your part not to provide the Miranda warning at the first stage.

A During the first stage - - yes, ma'am.

Q And this - - you begin your interview of my client on February 17th, of '97, at around 3:45 a.m. - - is that correct?

A I believe that's probably correct. I've got it a couple of pages down in my file - - I can tell you the exact time.

Q Do you have your file there in front of you?

A Yes, I do.

Q Could you tell me what your file reflects please?

A Certainly. No - - the tape version began at about 4:30 and the first time myself and Windle talked to her was about 3:45.

Q Let me talk to you about the first stage of the interrogation - - the statement you got from my client on February 17th. Did you make any notes on that?

A I don't believe I did - - no.

Q You didn't make any notes in the first stage interrogation.

A I don't recall writing any notes.

Q Do you recall whether or not there were any **[37]** differences in her answers to you between the first stage of that interrogation on February 17th, 1997, and the second stage that was tape recorded?

A If there were, I believe they were very minor. I don't recall specifics.

Q And you wouldn't have made notes of that - - any differences - - correct?

A I think I would have mentioned it during the tape recoding.

Q You think you would have mentioned it.

A I should have.

Q What about my client asking you whether or not she could attend her son, Jonathan Seibert's funeral? Do you recall her asking you that in the interview - - the February 17th interrogation?

A I don't know. I don't recall her asking that.

Q Okay.

A She very well could have.

Q So there are things that she might have said that you don't recall unless it was contained on the tape - - is that right?

A That's possible.

Q In the first stage of that interrogation when you were speaking to my client, at some point in that interrogation, she told you that there was no plan or **[38]** intention to have anyone die in that fire - - correct?

A Yes, ma'am.

Q And she told you that in the first stage.

A Yes, ma'am.

Q In that part that's not on the tape recording - - correct?

A Yes, ma'am.

Q Okay. So the part that's on the tape recording is after you questioned her on that matter repeatedly and she finally says yes - - is that correct?

A Well, I detailed the questioning as well as I was capable of in my reports and I'm sure that that's one of the first things that she said.

Q Okay. And again, so the first part is a deliberate decision on your part not to provide her with her Miranda rights until after you get the information you're seeking and that's when you decide to give her the Miranda rights and make a tape recording.

A The way you characterize it isn't quite the way I was trained. Basically, you're rolling the dice. You're doing a first stage where you understand that if you're told something that when you do read the Miranda rights, if they invoke them, you can't use what you were told.. We were fully aware of that. We went forward with the second stage, read Miranda, and she repeated the

items she had told us.

[39] Q It's your belief then if you get information from her prior to giving her her Miranda warning and then you give her her Miranda warning and she invokes her right, that you can't use the information from the first stage.

MR. AHSENS: Well, Your Honor, objection. His belief is irrelevant.

THE COURT: Sustained.

MS. DAVIS-KERRY: Well, I'm just trying to follow up on something.

THE COURT: Sustained.

Q (by Ms. Davis-Kerry) When you said rolling the dice in this two-stage process, you're not saying that you have to live with the answers you get in the first stage.

A I'm not sure I understand what you're saying.

Q Okay. And that's what I'm not sure either - - what you're saying back to me. Tell me again - - you tell me that you roll the dice when you perform this sort of two-stage interrogation - - correct?

A Yes, ma'am.

Q Why do you refer to it as rolling the dice?

A You may not get any information at all.

Q In which part of the interrogation?

A In either part. You may never even go to the second stage.

Q But you did go to a second stage in this matter **[40]** - - in this interview.

A Yes, ma'am.

Q Although in the first stage my client told you she had nothing to do with this - - correct?

A Yes, ma'am - - initially she told us that.

Q And then you kept asking her and telling her that you knew differently - - is that correct?

A We explained some of the evidence to her - - explained some of the situation to her and she changed her story.

Q She changed her story.

A Yes, ma'am.

Q But her first answers to you, without benefit of Miranda, was that she had nothing to do with it.

A That's true.

Q And then you continued in that vein - - that line of interrogation with her, telling her you knew that to be different - - correct?

MR. AHSENS: Your Honor, I'm going to object. We're plowing the same ground again. I think this has been asked and answered.

THE COURT: Overruled.

Q (by Ms. Davis-Kerry) I'm talking about the first stage without benefit of Miranda warning. Although my client says to you - - I had nothing to do with it. She tells **[41]** you that there was no intention for anyone to die in that fire, you continued to interrogate her until she agrees with you that there was a plan for Donald Rector to die in the fire - - correct?

A I continued to interrogate her until she told me the truth.

Q And that was that there was a plan for Donald Rector to die in the fire - - that's what you're saying the truth is.

A That's what she told me the truth was.

Q But she first tells you that there was no plan.

MR. AHSENS: Your Honor, objection again. How many times . . .

THE COURT: Sustained.

MR. AHSENS: . . . do we need to go through this?

THE COURT: Sustained.

Q (By Ms. Davis-Kerry) And all of this was without the benefit of Miranda.

A Yes, ma'am.

Q And in fact, in the second stage, the only thing that is included in your tape recording is an admission by my client.

A I believe she pretty much admits to it - - yes, ma'am.

Q And you don't include the fact that she tells **[42]** you prior to that that there was no plan for anyone to die

in the fire.

A That's in my report, ma'am.

MS. DAVIS-KERRY: I don't have anything further.

MR. AHSENS: No further questions.

THE COURT: May this witness be excused?

MR. AHSENS: Yes, Your Honor.

THE COURT: You're excused, Officer - - thank you.

THE WITNESS: Thank you, sir.

MR. AHSENS: May he retrieve that one exhibit, Your Honor? It is from his file.

THE COURT: As far as I'm concerned. Is there something he needs to give to you today? You were going to give him your address so he could forward the training materials.

MS. DAVIS-KERRY: Yes.

MR. AHSENS: You need to retrieve that Waiver from the Bench.

THE COURT: Excuse me - - I have that up here.

oOoOo

MR. AHSENS: I have no further evidence on this motion, Judge.

THE COURT: Fine.

[43] MS. DAVIS-KERRY: That's all I would have on the matter. Do you want argument now or . . .

THE COURT: Yes.

MS. DAVIS-KERRY: All right. I think that my client - - well, I argue that my client's statements should be suppressed for a number of reasons - - the first being that no probable cause for her arrest was established in this matter. The second is this - - what I believe is a big Miranda problem wherein they deliberately go out and get information - - incriminating information, choosing not to provide someone who is already in custody with the benefit of the Miranda warnings until after they get the information they want, and then they provide the warning and waiver forms and repeat the information. So it may be argued that what we are referring to as the

first stage interrogation may not be admissible, but the second stage should be. My argument to the Court in anticipation of that is the second stage is fruit of the poisonous tree and that none of it should be admitted.

THE COURT: Thank you. Mr. Ahsens?

MR. AHSENS: Fruit of the poisonous tree, Your Honor, more appropriately refers to when you have a statement that is the result of an improper arrest. Here you have an arrest based on information elicited from co-Defendants, as the officer mentioned, that led to her arrest - - that she was involved - - that led them to arrest her. I think that's **[44]** patent from what we have here. Further, you have in this particular instance a conversation with her which produced incriminating information - - a waiver of - - or administration of rights - - an appropriate administration thereof and waiver thereof, after which the Defendant gives a statement which is incriminating. I think the fruit of the poisonous tree doctrine also makes it fairly clear that once you read those Miranda rights, any taint is removed from anything that comes thereafter. And I don't believe under either theory that the second portion of that conversation should be suppressed - - that is the recorded portion. And I take it that the prior conversations on different tapes are really not at issue.

THE COURT: Well, the prior - - prior custodian . . .

MR. AHSENS: Precustodial conversations.

MS. DAVIS-KERRY: Precustodial.

THE COURT: Precustodial stuff is certainly outside the scope of this motion. We actually have three times that we're talked to.

MR. AHSENS: Yes, sir - - the 12th, the 14th and the 17th, respectively.

THE COURT: Okay. And they're not using the information that they found out in the second - - in the custodial - - in first level interrogation or prior interrogation - - first level of the interrogation, but rather using the second interrogation . . .

[45] MR. AHSENS: Yes, sir - the post Miranda.

THE COURT: . . . after she was advised of her Miranda rights. I'm sure we're - there are lots of cases on that. The motion is denied. So we'll see what happens.

MS. DAVIS-KERRY: May I have leave of Court to federalize?

THE COURT: Excuse me?

MS. DAVIS-KERRY: May I have leave of Court to federalize my objection to the ruling?

THE COURT: Absolutely.

MS. DAVIS-KERRY: Thank you. Defendant objects to the ruling of the Court on the grounds that it violates her rights pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as her rights guaranteed by equal protection and due process of law, reliable sentencing and fairness at trial, also those rights as guaranteed her by Article I, Sections Two, Ten and Eighteen (a) of the Missouri Constitution.

[TRIAL TESTIMONY OF RICHARD HANRAHAN]

[763]

RICHARD HANRAHAN, being sworn by the Deputy Clerk, testified as follows:

THE COURT: Take the stand please.

[764] THE WITNESS: (Complies)

DIRECT EXAMINATION

* * *

[775]

Q (by Mr. Ahsens) Did you have, on the evening of the fire or early the next morning, some contact with a Patrice Seibert?

A Yes, sir, I did.

Q And where did that occur?

A My first contact with Ms. Seibert was at the hospital the night of the fire.

Q And what was your purpose in contacting her there?

A Actually, I was trying to get to the scene - - Captain Day wanted me there - - and she came out of the treatment area that Mr. Roper and Mr. Seibert were in. She asked if I was a police officer and asked if her other son got out of the trailer.

[776] Q And did you tell her that he had not?

A Not immediately. I took her to a conference room. I knew that there were possibly two bodies in the trailer, but I didn't have any details at that time.

Q Did you inform her of what you did know?

A No, sir. At that point, I told her that I needed to get some more facts. I found out that she preferred a certain individual from the waiting room to come back and be with her and then I made some phone calls away from her to confirm what was going on.

Q All right. Did you - - were you the one who eventually notified her of Jonathan Seibert's death?

A Yes, I was.

* * *

[831]

MS. DAVIS-KERRY: I would renew my motion to suppress the statements at this time, Your Honor, that has already been heard and ruled on.

THE COURT: Right. The motion, again, is denied and you may have it federalized - - your objection.

* * *

[911]

RICHARD HANRAHAN, having been previously sworn, took the stand and testified as follows:

THE COURT: You may inquire.

MR. AHSENS: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR AHSENS:

Q Detective Hanrahan, I'd like to turn now to February 14th, 1997 - - two days after the fire at the Seibert trailer.

A Okay.

Q Did you have occasion to go to St. Louis, Missouri, to St. John's Hospital to speak with Patrice Seibert?

A Yes, sir, I did.

Q With regard to that conversation, is this with the same woman that you identified earlier as the person you knew as Patrice Seibert?

A Yes, sir.

[912] Q Where did you meet with her?

A Well, we initially talked briefly near the Burn Unit and then we ended up talking - - myself, her and Roy Day talked in the security offices.

Q Did you place - - was the Defendant under arrest at the time?

A No, sir.

Q So this was just an interview.

A That's correct.

Q When you spoke with her, sir, did you speak

with her about what she might know concerning the facts surrounding the burning of her trailer?

A Yes, we did.

Q And sir, what did you ask her, if anything?

A We asked her some very direct questions as part of the investigation - - did she know anything about how the trailer burned.

Q Did she state whether she knew or not?

A She didn't know.

Q She said she did not know.

A That's correct.

Q Did she indicate to you, sir, what her movements were on the later afternoon and evening of February 12th, 1997?

A Yes, sir, she did.

[913] Q What did she tell you?

A She told us that after she put her smaller children on the church bus, she had left in a taxi and gone to a friend's house and when the friend wasn't home, she had walked down to another friend's house and been there.

Q Did she indicate how long she had been at this other friend's house - - how long she spent there?

A She was there until she said someone came and got her and told her to come to the hospital.

Q And was that then after - - was that when she told you she learned about the fire?

A That's correct.

Q Did you ask her whether there was any gasoline stored in her trailer?

A Yes, we did.

Q And what was her response to that, if anything?

A No, there was not.

Q Did you ask her about Darian Seibert, her son, and Derrick Roper?

A Yes, we did.

Q Did she indicate whether she had seen them on the late evening - - or late afternoon and evening of February 12th?

A Yes - - she named them as two of the people that were at the trailer when she left.

[914] Q Who did she say was present at the trailer when she left?

A Derrick Roper, Darian Seibert, Jonathan Seibert and Donald Rector.

Q Did she say what these four persons were doing when she left?

A She specified that Jonathan was in the front bedroom - - the bedroom closest to Marlette Street - - in bed, and that Donald was on the couch in the back bedroom sleeping.

Q All right. Did she indicate to you that Jonathan Seibert had died?

A No, sir.

Q All right. What were the other two doing as far as she told you?

A I don't recall her specifying what they were doing when she left. I recall she had said that prior to her leaving, Derrick Roper had been playing ball with the younger kids outside.

Q Well, in talking with her, did you ask her specifically if she was involved in any way in the fire at her trailer?

A Captain Day did - - yes, sir.

Q And what was her - - was that in your presence?

A Yes, sir.

Q And what was her response?

[915] A No, she wasn't involved.

Q Did you ask her specifically if she had any knowledge as to how Donald Rector was killed?

A Yes, we did.

Q And what was her response, if any?

A She had no knowledge.

Q Did you ask her whether she had been told by Derrick Roper, or anyone else for that matter, about the fire being set prior to and actually being set?

A Yes, we did.

Q And what was her response to that, if anything?

A That she hadn't and that she'd only had a brief chance to talk to Derrick Roper.

Q Did you ask her whether she had asked anyone to lie or cover for her in this matter?

A Yes, we did.

Q And what was her response to that, if anything?

A That she didn't. As a matter of fact, sir, it may have been that we asked her if anyone had asked her to lie or cover for them.

Q I beg your pardon - - I may have misstated that. And did anyone - - did she indicate whether anyone had.

A She said no one had.

Q Did you confront her with the statement that was made to you by Darian Seibert to the effect that he went **[916]** home, walked in, turned on the light and the fire began?

A We told her about that statement - - yes, sir.

Q Okay. And what did she have to say about that, if anything?

A After discussing the statement, initially she said that it couldn't be true and then she eventually said that she agreed that it had to be a lie.

Q Was that pretty much the substance of that conversation with her?

A Yes, sir - - pretty much.

Q I understand there may have been many other things that were discussed, but was that the basic substance of it?

A Yes, sir.

Q So she indicated no knowledge whatsoever of how this event came to pass.

A That's correct.

Q Did you have a second conversation with her sometime later?

A Yes, sir, I did.

Q And when did that conversation take place?

A The early morning hours of the 17th.

Q And where did that conversation occur?

A In the offices of the St. Louis County Police

Department.

[917] Q And is that somewhere near St. John's Hospital?

A It's in Clayton. It's not a long drive. I think it took us five to ten minutes to drive it.

Q And was that someplace that you deliberately took the Defendant to speak with her?

A Yes, sir - - I had her taken there.

Q And was she under arrest at that time?

A Yes, sir, she was.

Q And did this conversation happen after you had had other conversations with Derrick Roper and Darian Seibert?

A Well, another conversation with Derrick Roper.

Q And it was based on what you learned there that you placed her under arrest and brought her in for questioning.

A That and a statement that was taken at the station the same evening from one of the people that knew Roper.

Q When you arrived at the station, you had an initial conversation with her - - is that correct?

A That's correct.

Q After that initial conversation, did you inform the Defendant of her rights under the Miranda decision?

A Yes, I did.

Q I'd like to hand you what's been marked as State's Exhibit 37 and ask you if you can tell me what this is **[918]** please?

A Yes, sir - - this is a rights advisement provided by the detective with St. Louis County that night.

Q And was that, in fact, read to the Defendant?

A Yes, sir, it was.

Q And did you ask her if she understood each of those rights as you read them to her?

A As I read them to her, I simply check-marked them when I was finished. I asked her if she understood each right.

Q Did she indicate to you in some fashion whether

she did or not?

A Yes, she did

Q And what was her response in each case?

A She indicated that she understood and she signed next to each of the rights to state that she understood.

Q And sir, did you then read the waiver portion of the form?

A I believe I let her read the waiver I'd have to check my report to be sure. I usually allow the suspect to read the waiver.

Q How does that waiver read?

A It says - - "I have read the above statement of my rights and I understand what my rights are. I am willing **[919]** to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me."

Q In fact, did you threaten the Defendant in any fashion?

A I did not.

Q Did you display a weapon or threaten a weapon - - I mean, you can do things that are non-verbal. Did you do anything that would be taken as threatening by the average person?

A I don't believe so - - no, sir.

Q Did you promise the Defendant any benefit of any kind in order to induce her to speak with you?

A The truth would make her feel much better.

Q Was that all you said?

A I believe so. I told her I believed that she was lying and the lie was hurting her.

Q Sir, did you, in fact, ask her to sign that form if she understood her rights and agreed to speak with you?

A Yes, sir, I did.

Q And did the Defendant do so in your presence?

A Yes, sir, she did.

Q Would you point out her signature to the Court

[920] please?

A (Complies)

Q And sir, did you sign that form yourself as a witness?

A Yes, sir, I did.

Q And was anyone with you who also signed that form?

A Fire Marshal Rodger Windle was also there.

Q And are both your signatures then present on that form as witnesses to her signature and waiver of having been informed and waiving her rights?

A Yes, sir, they are.

Q Would you point out your signature and Officer Windle's signature please?

A (Complies)

MR. AHSENS: Your Honor, I offer State's Exhibit No. 37.

MS. DAVIS-KERRY: Objection pursuant to the previously filed motion to suppress, Your Honor.

THE COURT: All right. Noted for the record - - you may have that federalized.

MS. DAVIS-KERRY: Thank you, Judge.

THE COURT: The objection is overruled. Admitted.

Q (by Mr. Ahsens) Did you then proceed to talk with the Defendant and to interview her about her knowledge **[921]** about this incident at her trailer?

A Yes, we did.

Q And did she tell you what had happened?

A Yes, she did.

Q And did she admit involvement in it?

A Yes, sir, she did.

MR. AHSENS: Your Honor, I have transcripts. I'd ask that the tape be brought forward. I need to check and make sure the tape is immediately available. It's my intention to play the tape, and counsel and I have agreed that we can pass transcripts out to the jury that they may read along as the tape is played.

THE COURT: All right.

MR. AHSENS: Let me check on that, if I may.

(Pause in proceedings. No recess taken.)

MR. AHSENS: My apologies, Your Honor.

MS. DAVIS-KERRY: Judge, could we approach the Bench before this starts please?

THE COURT: Yes, you may.

MS. DAVIS-KERRY: Thank you.

oOoOo

[922] AT THE BENCH:

THE COURT: Yes, ma'am.

MS. DAVIS-KERRY: Judge, I would just ask for a cautionary instruction at this time. Should there be any deviance - - and I don't expect that there will be - - but any deviance between the actual tape and the transcript, that the jury be instructed that the tape is the best evidence.

MR. AHSENS: Absolutely.

THE COURT: All right.

MS. DAVIS-KERRY: Thank you, Your Honor.

oOoOo

IN OPEN COURT

THE COURT: Ladies and gentlemen of the jury, let me caution you - - in listening to this tape and reading the transcripts you've been - - have they been furnished with their transcripts yet? No.

MR. AHSENS: We have not yet done that, sir.

THE COURT: All right. They're going to furnish you with transcripts of the recording. In case there's any deviance between the transcript and the tape - - the actual recording, you're to be guided by your recollection of the recording, rather than the transcript. All right. You may proceed, counselor.

[923] MR. AHSENS: Thank you, Your Honor.

Q (By Mr. Ahsens) Sir, I want to show you what's been marked as State's Exhibit No. 42 and ask you if

you can tell me what's contained therein?

A It's a microcassette tape recording of the interrogation of Patrice Seibert.

Q And is that of the same interview that you had with her at the St. Louis County Police Department on the morning of February 17th, 1997?

A Yes, sir.

Q Would you open the exhibit please?

A (Complies)

Q Is that indeed the cassette, sir, and do you recognize your mark?

A Yes, sir, that's the cassette.

Q Thank you. Sir, I also want to show you what's been marked for purposes of identification as State's Exhibit No. 43 and ask you if you can tell me what that is?

A This is a copy of the transcript that was done of the tape.

Q And did you review the tape with that transcript in an effort to ensure its accuracy?

A Yes, sir, I did.

Q Were there portions you could not understand clearly?

[924] A Yes, sir.

Q And how were those reflected in the transcript?

A They're reflected as inaudible.

Q All right, sir. Did you then ensure that that transcript was as accurate as it could be?

A Yes, I did.

MR. AHSENS: Sir, at this time I would offer 42 and 43.

MS. DAVIS-KERRY: Objection based on previously filed motions, Your Honor.

THE COURT: All right. Again, that's federalized for you, counselor, and overruled.

MS. DAVIS-KERRY: Thank you, Your Honor.

THE COURT: Admitted.

MR. AHSENS: If I may at this time, sir, I'd like to pass copies of Exhibit 43 to the jury for their use.

THE COURT: You may do so.

MR. AHSENS: Your Honor, at this time, with the Court's permission, I propose to play the tape. It's my intention to set the recorder on the bar in front of the jury so it will be best audible to them.

THE COURT: All right.

THEREUPON, State's Exhibit No. 42 was started for the jury with the following discussion.

THE COURT: Can't hear that, counselor. Would you **[925]** put that next to a microphone?

MR. AHSENS: I'm turning the volume all the way up as well, Judge.

THEREUPON, State's Exhibit No. 42 was played for the jury in full at this time.

THE COURT: Collect the transcripts please.

MR. AHSENS: By the Bailiff's count, we have retrieved all copies.

THE COURT: All right.

Q (By Mr. Ahsens) Officer, was that then the sum and substance of your - - the recorded interview with the Defendant?

A Yes, sir, it was.

MR. AHSENS: I have nothing further of this witness. You may inquire.

MS. DAVIS-KERRY: Thank you, Your Honor.

oOoOo

CROSS EXAMINATION

BY MS. DAVIS-KERRY:

Q When you went up to St. Louis County to arrest my client, it was about 3:00 in the morning when she was actually arrested - - is that right?

A About that.

[926] Q Okay. And you had asked for assistance from a St. Louis County officer.

A That's correct.

Q Named Kevin Clinton.

A Yes, ma'am.

Q Okay. Now when you went up to St. Louis County, you went up with the - - I guess a strategy on how you were going to go about getting a statement from my client - - correct?

A Yes, ma'am.

Q All right. And part of that included the fact that you wanted to talk to her first before advising her of any of her Constitutional rights - - correct?

A That's correct.

Q All right. And you did not want Kevin Clinton, the St. Louis County officer who was going to assist in this arrest, to advise her of her Constitutional rights either.

A No, I didn't, but he didn't actually assist. He made the arrest - - I couldn't make the arrest.

Q Right - - because it wasn't your jurisdiction.

A That's correct.

Q Okay. But you had told Officer Clinton from St. Louis County that you did not want her advised of her rights - - is that correct?

A That's correct.

[927] Q Because you wanted her to talk.

A Certainly.

Q All right. And so you go up and she's at the hospital where Darian is - - correct?

A No - - she's in the waiting room.

Q All right. But this is at the hospital where Darian is.

A That's correct.

Q All right. And she's sleeping in the waiting room - - isn't she?

A That's correct.

Q All right. And you have to wake her up.

A Yes, ma'am.

Q Okay. So it's 3:00 in the morning, you wake her up in this hospital waiting room and you have Clinton place her under arrest.

A That's correct.

Q All right. Now you know that she's been through

the loss of one son, that being Jonathan - - correct?

A Yes, ma'am.

Q And she's there at the hospital with the potential of losing Darian due to his injuries - - is that right?

A That's correct.

Q Okay. Did you take into account that this **[928]** woman might be grief stricken?

A I would expect that she was feeling some grief - - yes, ma'am.

Q Okay. In fact, she showed you grief throughout your interview with here - - didn't she?

A Throughout the interview?

Q She showed you grief - - she was upset - - is that right?

A Yes, ma'am.

Q In talking about her children.

A Yes, she cried some.

Q And in talking about this incident.

A Yes, ma'am.

Q All right. And when you say to her that you believed she was truly sorry, you were telling her the truth - - weren't you?

A The truth as I knew it?

Q You told her that you believed she was truly sorry.

A I told her that - - yes, ma'am.

Q You lied to her then.

A I wasn't entirely truthful - - no.

Q Okay. So you lied in order to get certain things - - is that right?

MR. AHSENS: I'm going to object to that, Your **[929]** Honor. This statement has been heard in its entirety by this jury and the efforts of counsel to characterize it are improper.

THE COURT: Sustained.

Q (By Ms. Davis-Kerry) Part of your strategy when interviewing someone - - specifically my client - - is to say or do certain things in order to get them to provide you information - - is that right?

A Certainly.

Q Okay. And if it happens that you will say or do certain things that may not be true, it's still part of your effort to get them to give you information.

A Only within certain limits.

Q Right. I understand you have your limits, but you will still bend the truth - - is that a fair statement?

MR. AHSENS: Your Honor, I'm going to object to this. It's irrelevant and immaterial. The Supreme Court of Missouri has decided that proactive interrogation techniques are proper.

THE COURT: Sustained.

MS. DAVIS-KERRY: And Judge, I'm not disputing what Mr. Ahsens has just given us. However, I think it goes to the overall credibility of the statement of my client.

THE COURT: You've already discussed that, counselor.

[930] Q (By Ms. Davis-Kerry) Before leaving for St. Louis County in order to arrest my client, you had had a conversation with the then Phelps County Prosecuting Attorney, Pat King - - is that correct?

A Yes, ma'am, I had.

Q All right. You were under direction from Pat King to make a case against my client.

A To do my best to make a case - - yes, ma'am.

Q Uh-huh. After Detective Clinton - - or Officer Clinton from St. Louis County arrested my client, he transported her over to the Police Department in St. Louis County - - right?

A Yes, ma'am.

Q And you and Rodger Windle followed him in one of your vehicles.

A In mine - - yes, ma'am.

Q In yours - - all right. And you and Rodger Windle were together.

A Yes, ma'am.

Q And you and Windle discussed your strategy about how you were going to question my client - -

correct?

A That's correct.

Q All right. And when you get to St. Louis County, there's a brief conversation between you and the St. Louis County Officer Clinton where Clinton told you that **[931]** he did not tell her her rights, but that he did tell her that she would talk to you - - is that correct?

A I'm pretty sure he told me he didn't ask her any questions, but that she had asked him some questions and he had told her that from what he knew, we had a very strong case and it would be best to tell the truth.

Q Okay. So Clinton's telling her that you have a strong case and you leave her in this room - - tell me about this room that you conducted the interview in.

A It's a very basic interview room.

Q Small room.

A Yes, ma'am.

Q Interior room.

A Yes, ma'am.

Q No windows.

A I believe there's a mirror.

Q Okay. A mirror for people to look in.

A I don't know if they had an observation room on the other side or not. They had cameras.

Q All right. But was it an observation mirror?

A I couldn't tell from looking at it. You always tend to make that assumption I think in a room like that, but I don't know for sure.

Q All right. She's not free to leave.

A No ma'am.

[932] Q And she is under arrest.

A Yes, ma'am.

Q But you specifically do not want to advise her of her rights at that time.

A That's correct.

Q And you want to talk to her first and you want to get her to admit before you turn on the tape recorder - - is that part of your strategy?

A As long as she doesn't say she doesn't want to

talk - - yes - - we intend to keep talking.

Q Okay. You put her in this interview room and you leave her there for several minutes before you start the interview - - is that right?

A Yes, ma'am - - she was in there for a little bit.

Q Can you tell the jury how long you think she was in there before you started the interview?

A I would guess probably fifteen to twenty minutes.

Q All right. So you leave her there in this room by herself for fifteen to twenty minutes.

A Yes, ma'am.

Q All right. Is that part of your strategy or your technique.

A Yes, ma'am.

[933] Q To create some stress - - is that right?

A To let them think about their situation - - yes, ma'am.

Q And that could create some stress - - is that correct?

A In a guilty person, I would think it would create a considerable amount.

Q It could create a considerable amount of stress in someone who's not guilty too.

A I would have to disagree.

Q All right. It's your opinion - - isn't it?

A Yes, ma'am.

MR. AHSENS: Your Honor, I'm going to object. She asked for his opinion.

THE COURT: Yes, she did - - sustained.

Q (by Ms. Davis-Kerry) During your interview with her, at a couple of occasions, you would pull your chair very close to her - - is that right?

A Yes, ma'am.

Q And you would stare at her for several minutes - - is that correct?

A Certainly.

Q Okay. And this is also part of your strategy.

A I'm not sure . . .

Q Part of your technique.

[934] A I generally make eye contact, or try to, with someone I'm interrogating the whole time.

Q All right. And you're very - - physically you're very close to her - - is that right?

A Probably - - we're at opposing - - or the same corner of the table. I'm on this side of the corner and she's on this side.

Q But you don't have a table between you.

A No, ma'am. The table in a proper interview room like that one is put against the wall.

Q You make her look at pictures of Donald Rector.

A I put a picture of Donald Rector in front of her.

Q All right. Now at some point in this interview, you want - - I'm sorry. At some point in this interview, my client tells you that the next day is the funeral for her son, Jonathan Seibert. Do you recall that?

A I believe that was something that she had mentioned when she told me she was thinking of hurting herself after the interview.

Q Okay. She wanted to go to the funeral for Jonathan - - is that correct?

A She asked me what the chances would be.

Q And you told her you didn't know or you would see.

[935] A That's correct.

Q In fact, she did not attend the funeral for her son - - did she?

A I don't know.

Q You didn't take her - - did you?

A No, ma'am, I did not.

Q And once she was arrested, she was never released from custody to the best of your knowledge - - is that right?

A That's correct.

Q Okay. Pat tells you that she knew the trailer was to be burned - - correct?

A Yes, ma'am.

Q All right. But you want her to admit that she

knew Donald was to die - - is that right?

A I wanted her to tell the truth.

Q You wanted her to admit that Donald was to die.

A As long as that was the truth - - yes, ma'am.

Q All right. But she doesn't admit that - - not - - you say that to her and she doesn't respond - - does she?

MR. AHSENS: Your Honor, I'm going to object again at this point. I think the recorded statement has been played - - the jury has heard it. Again we're trying to characterize or mischaracterize this in some fashion and I think that's improper.

[936] THE COURT: The jury will be reminded that it's their recollection of the facts as they occur - - not what the attorneys say. You may continue your questioning.

Q (by Ms. Davis-Kerry) I'm talking about the interview before the tape recoding was turned on - - all right? Let's clarify that.

A Oh - - okay.

THE COURT: Excuse me - - then you may continue, counselor.

MS. DAVIS-KERRY: Thank you, Your Honor.

Q (by Ms. Davis-Kerry) All right. Before you turn on the tape recorder, you interview my client for quite awhile - - isn't that correct?

A Yes, ma'am.

Q She's arrested at 3:00 in the morning and you let her sit in this interview room by herself for some twenty - - what did you say - - twenty minutes or so?

A Fifteen to twenty.

Q Fifteen to twenty minutes - - and then the tape itself is not turned on until - - what is it - - 4:30?

A That's correct.

Q Okay. So we have some ninety minutes - - is that fair to say?

A There is another fifteen to twenty minutes when she was given a break, a cup of coffee, allowed to smoke a **[937]** cigarette. Then the tape was turned on.

Q But you interview her for quite some time before ever turning on the tape - - right?

A Yes, ma'am.

Q And this is the interview done without advising her of her Constitutional rights - - is that correct?

A That's correct.

Q And this is part of your technique - - isn't that right?

A Yes, ma'am.

Q All right. And in the interview before the tape was turned on, Pat admits to you that she knew the trailer was to be burned.

A That's correct.

Q And you say to her - - "Donald was also to die in his sleep." You say that - - correct?

A Yes, ma'am.

Q All right. She doesn't say you're right.

A At the point when I said that, she began to cry and didn't answer me at first - - no, ma'am.

Q All right. You squeeze her arm.

A Gently - - yes, ma'am.

Q All right. And you actually say - - "Donald was to die in his sleep" - - more than once - - is that right?

A I probably did - - yes, ma'am.

[938] Q Okay. So you've repeated it.

A I'm sure I did - - yes, ma'am.

Q And she's sobbing - - is that right?

A Yes, ma'am.

Q But you don't have a clear admission yet - - do you?

A Not at that moment - - no, ma'am.

Q Okay. And you go through this for several minutes - - or for actually well over half an hour - - is that fair to say?

A Through the interview?

Q Uh-huh - - the interview before the tape recorder was turned on.

A That's fair to say.

Q Okay. Then at some point you turn on the tape

recorder.

A Yes, ma'am.

Q Because you've finally broken her down - - is that right?

MR. AHSENS: I'm going to object to this characterization, Your Honor. If she has a question, that's fine, but I don't believe that's proper.

THE COURT: Sustained.

Q (by Ms. Davis-Kerry) She has said what you wanted to hear and you turn on the tape recorder.

[939] A Well, what she had done was said part of what we believed matched the evidence, so we believed it to be the truth and we went ahead and took a formal statement.

Q Okay. And you tell her when you turn on the tape that you're going to help her through by asking the questions - - is that right?

A That's correct.

Q These are leading questions - - aren't they?

A They're questions she could have answered any way she wanted to, ma'am.

Q They're leading questions though - - aren't they?

MR. AHSENS: I'm going to object to that - - that calls for a conclusion.

THE COURT: Argumentative - - sustained.

Q (by Ms. Davis-Kerry) You're trained in the technique to ask a leading question - - aren't you?

MR. AHSENS: I'm going to object. It's irrelevant as to the training. What he did may be relevant.

THE COURT: Sustained.

MS. DAVIS-KERRY: The jury can recall. They've heard the tape and they've seen the transcript.

MR. AHSENS: I'll object to the comment - - that's instructions from counsel to the jury. They're improper.

THE COURT: Yes - - the Court will give the **[940]** instructions in this case.

Q (by Ms. Davis-Kerry) Even on this tape, Pat told you that they were to try to get Donald out - - is that right?

A Yes, she did.

Q And she told you she just figured that they would do that - - get him out - - is that right?

A My understanding and what I recall is that she said they were to try to get him out - - yes.

Q And that she never thought that they wouldn't get him out. That's also on that tape - - isn't it?

A I don't know if she exactly said that. I'm not sure.

Q She figured they would get him out.

MR. AHSENS: Your Honor, again, I'm going to object. The tape has been played. Now I think we're - - I don't know what we're doing here, but this is not proper questioning.

THE COURT: Are we talking about the time on the tape, counselor?

MS. DAVIS-KERRY: I'm talking about the time on the tape.

THE COURT: Then the tape is the best evidence of what occurred on the tape.

MS. DAVIS-KERRY: And I'm asking this officer his recollection of that tape.

[941] MR. AHSENS: His recollection is irrelevant. We've played the tape.

THE COURT: Sustained. It is the jury's recollection of the tape that counts, counselor - - not this officer's recollection of the tape.

MS. DAVIS-KERRY: May I continue, Judge?

THE COURT: You may.

Q (by Ms. Davis-Kerry) A number of times you say to her - - "He was supposed to die in his sleep."

A Yes, ma'am.

Q Okay. You say it - - correct?

A Yes, ma'am.

Q Okay. Now you made reference to this point in your interview with my client where you thought she was going to hurt herself - - is that right?

A It was actually after the interview - - yes, ma'am.

Q Okay. And you had some concerns of what - -

she was suicidal?

A She had told me she was thinking of hurting herself.

Q Okay. And you advised her that that would not be a good thing to do because she still had children that needed her.

A Yes, I did.

[942] Q Okay. So you didn't want her to do anything about taking her own life at that point - - is that correct?

MR. AHSENS: I'm going to object to that as irrelevant - - what he - - -

THE COURT: Sustained.

Q (by Ms. Davis-Kerry) You tried to prevent her from taking her own life.

A Yes, ma'am.

Q And that was a sincere attempt on your part

MR. AHSENS: Objection - - irrelevant and immaterial.

THE COURT: Sustained.

Q (by Ms. Davis-Kerry) Do you think it's an irony that you tried to save her from taking her own life?

MR. AHSENS: Same objection.

THE COURT: And again sustained.

[Sticker: State's Exhibit 37]

227 S. Central, Clayton
Div Crim Invest.
St. Louis Co. P.D.

ST. LOUIS COUNTY DEPARTMENT OF POLICE

WARNING & WAIVER FORM

Before we ask you any questions, you must understand what your rights are:

/s/ PDS ✓ 1. You do not have to make any statement at this time and have a right to remain silent.

/s/ PDS ✓ 2. Anything you say can and will be used against you in a court of law.

/s/ PDS ✓ 3. You are entitled to consult with an attorney before any interview and to have an attorney present at the time of interrogation.

/s/ PDS ✓ 4. If you cannot afford an attorney, one will be appointed for you.

_____ 5. (Juvenile Suspects Only) If you are fourteen years of age or older you could be tried in court as an adult.

I have read the above statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

/s/ x Patrice D. Seibert — /s/ x February 17, 1997
Signature of Suspect — Date

/s/ x 4:30 a.m.
Time

Witness — Date — Time

I hereby certify that the foregoing Warning and Waiver was read by me to the above suspect, that the suspect also read it, and the suspect has affixed his (her) signature hereto in my presence.

/s/ Richard E. Hanrahan 999
Signature - Police Officer

/s/ Rodger R. Windle 1474
Witness (In the case of a juvenile suspect, the attending Deputy Juvenile Officer)

****

ROLLA POLICE DEPARTMENT
INTERVIEW WITH:

PATRICE SEIBERT

CASE # 97000335

FEBRUARY 17, 1997

****

[Sticker: State's Exhibit 43]
facsimile copy of Exhibit 43

[2] SIDE 1

Rick My name is Detective Richard Hanrahan. I'm with the Rolla Police Department. Today's date is February 17th, 1997. It's about 0430 hours in the morning. I'm in the interview room of the division of criminal investigations of the St. Louis County Police Department, located at 227 South Central Street in Clayton, Missouri. With me here is an investigator from the Fire Marshall's office. Would you identify yourself?

Rodger I'm Rodger Wendall with the Missouri Division of Fire Safety, investigator.

Rick And we're here this morning talking to Patrice Seibert.

Patrice Right.

Rick Patrice, would you state your full name?

Patrice Patrice Diane Seibert.

Rick And what's your date of birth, Patrice?

Patrice January 18, 1958.

Rick Ok. And Patrice, before we go any further, I have to read your rights to you, you understand that?

Patrice Yes.

Rick Ok. You do not have to make any statement at this time and have a right to remain silent. Do you understand that?

Patrice Yes.
Rick Ok. Anything you say can and will be used against you in a court of law. Do you understand that?
Patrice Yes.
Rick You're entitled to con...consult with an attorney before an interview and have an attorney present at the time of interrogation. Do you understand **[3]** that?
Patrice Yes.
Rick If you cannot afford an attorney, one will be appointed for you. Do you understand that?
Patrice Yes.
Rick Having your rights in mind, 'trice, are you willing to go ahead and answer questions for us?
Patrice Yes.
Rick Ok. What I need you to do...is I need you to initial next to every one of these check marks where I read the rights to you, and I need you to sign and date and time here.
(Pause in the conversation)
Patrice (inaudible) today?
Rick Today is the seventeenth of February, two-seventeen-ninety-seven. I know.
(Pause with background noises)
Rick Ok, 'trice, we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?
Patrice Yes, we have.
Rick Ok. What I'm gonna do is I'm gonna try to help you along by asking you questions, Rodger and I are. And we'll let you answer them, ok?
Patrice Ok.
Rick Now on Wednesday the twelfth, what happened to set everything in motion?
Patrice Jonathan died.
[4] Rick Ok. And who found Jonathan?
Patrice I did.

Rick And 'bout what time of day was that 'trice?
Patrice Somewhere 'round eight, eight-thirty.
Rick Ok. And what did you do?
Patrice I woke up Michael and told him.
Rick That's your son Michael?
Patrice Yes.
Rick And then what happened?
Patrice I sent him to go get his older brother, Darian.
Rick And where was Darian at?
Patrice Up at Derrick's house.
Rick That's Derrick Roper's house...
Patrice Right.
Rick And then what happened?
Patrice And the boys came down to the house and...I told them about it.
Rick Ok. Were you pretty scared right then?
Patrice Yes I was.
Rick And what was your fear? What were you afraid of?
Patrice I was afraid of...child abuse, neglect, that type of thing.
[5] Rick And why were you afraid of that?
Patrice Because Jonathan, bein' severely handicapped, I hadn't gotten in contact with any of the doctors or anything, for like, his bedsores and stuff that, you know, I had been doctorin'.
Rick So you felt like they're probably gonna give you a really hard time?
Patrice Yes.
Rick Ok. So what happened next?
Patrice Well I...I needed to try and find a way to keep from havin' people come in and question me about, you know, Jonathan.
Rick And, and what'd you come up with?
Patrice (Sighs)
Rick It's ok, take your time.
Patrice Basically....I knew the trailer was gonna be burned down.
Rick And how did you know that?

Patrice (Pause) 'Cause that'd been the easiest way to dispose of the body....
(Unknown) Mm-hmm.
Patrice ...you know, without getting questions basically being asked.
Rick Ok. Now when you all are talkin' about burning the trailer down, who's there?
Patrice Derrick, Skate...
Rick Jeremy?
Patrice Yes.
[6] Rick Ok.
Patrice ...Michael and myself.
Rick Was Darian not there?
Patrice Oh! Darian was there, yes.
Rick Ok.
(Coughing)
Rick Do you remember who first brought up the idea of burning the trailer?
Patrice I think it was Derrick.
Rick Ok. And then from there you all discussed it?
Patrice Yeah (inaudible).
Rick Ok. And in your discussion, did you all decide that that was the best way to make sure that nobody would ask any questions about Jonathan's condition?
Patrice Yes.
Rick Ok. Was Donald in the house when you had this discussion?
Patrice No, he was at a doctor's appointment.
Rick Ok. So what happened next?
Patrice Derrick and Darian left to go get me some cigarettes.
Rick And?
Patrice Then they came back. I got my cigarettes, and then they left again, for a while.
Rick Did you give them some money?
[7] Patrice I gave them money when they went to go get my cigarettes.
Rick And did you know or did you believe that that

was gonna be used to buy gas?
Patrice No I did not. I didn't know...but I know I didn't get any change back. 'Cause he had asked me for three bucks, but I didn't get any change back.
Rick Ok. So what happened when they came back?
Patrice Derrick handed me my pack of cigarettes and this receipt...that had like oil, or somethin' on it.
Rick Where was the receipt from?
Patrice I think it was O'Reilly. And I handed it back to him.
Rick We've got a receipt right now from O'Reilly's for a five gallon gas can, ok?
Patrice I thought it was oil or somethin' on there.
Rick So they left. What happened next?
Patrice I left with David.
Rick Ok. David who?
Patrice David Payne.
Rick Ok. And David knew that Jonathan had died?
Patrice No, I never told him.
Rick Ok. When did you come back?
Patrice Oh...somewhere around three.
Rick And then what happened?
Patrice The kids came home.
[8] Rick Ok. And how'd you handle the kids around Jonathan? Did they play outside or what'd you do?
Patrice Well, just basically, they (inaudible) come in, they do their homework. Watch the TV or it was, it was pretty nice day, you know?
Rick Um-hmm.
Patrice Donald took the kids to the basketball court.
Rick So they went down and shot some hoops. Ok, and then what happened?
Patrice About six o'clock...kids came back in...and Derrick and Darian showed up.
Rick And you talked to 'em some more?
Patrice I didn't talk to 'em anymore than that.
Rodger When did Donald show up?

Patrice In the morning.
Rodger After his doctor's appointment (inaudible)?
Patrice He showed up there at the house.
Rodger Ok, so Donald's there...when, whenever Derrick and Darian showed up, right?
Patrice Right.
Rick Ok, and what was Donald doing when they showed up there?
Patrice I can't remember. David came in with me. Um...he was fixin' somethin' to eat.
Rick Ok.
Patrice That was 'round three or so, 'cause he said he needed to take his medicine.
[9] Rick Now, in discussion you told us, you told us that there was a understanding about Donald.
Patrice Yes.
Rick Did that take place earlier that morning?
Patrice Yes.
Rick And what was the understanding about Donald?
Patrice If they could get him out of the trailer, to take him out of the trailer.
Rick And if they couldn't?
Patrice I, I never even thought about it. I just figured they would.
Rick 'Trice, didn't you tell me that he was supposed to die in his sleep?
Patrice If that would happen, 'cause he was on that new medicine, you know...
Rick The Prozac? And it makes him sleepy. So he was supposed to die in his sleep?
Patrice Yes.
Rick Ok. So when Derrick and Darian come back the last time, what happens?
Patrice Took thekid, well...(sigh) I mean...Derrick went out and played basketball with Patrick and Shaun out in the road for a while.
Rick Mm. And then what happened?
Patrice Church van came, and I put the kids on the, on

the van.
Rick Ok. Had you already called for a taxi?
Patrice No, I didn't call for a cab until after they got on the church bus.
Rick Ok. And is that the next thing that happened? You were leavin' for a **[10]** reason, weren't you?
Patrice Yes, I was.
Rick And what was your reason for leavin?
Patrice I didn't want to be there when the trailer burned down.
Rick And so after you left, what was the next thing that happened?
Patrice I went to David's. He wasn't there, so I walked over to my friend's house on fifth street.
Rick And who is that friend?
Patrice Netty Payne.
Rick Ok. And how did you find out about the fire? Someone come and get you?
Patrice No. I walked back over to David's about 45 minutes later. And then about 8:30 or whatever, David's sister-in-law came over and got us...or, I should say got me.
Rick And told you about the fire?
Patrice Well, actually she didn't. She just told me to get in the car; there were three other people in there. Skate was one of 'em. 'Cause I don't know the other two. And then you told me the trailer had burnt down and Darian and Derrick had gotten burned in the trailer.
Rick And that's when you first started to have to go through the stress and strain of acting surprised about the fire?
Patrice Yeah.
Rick 'Trice...are you truly sorry for what's happened?
Patrice Yes, I am.
Rick I believe you. I've got to sit down and talk to Donald's momma in the **[11]** morning. Is there anything you'd like me to tell her for you?
Patrice Just tell her I'm sorry. I didn't mean for her

son...

Rick You didn't mean for him to end up...like that? It'd surely been a lot easier on her if he'd died in his sleep like he was supposed to. Rodger, do you have anything you need to ask?

Rodger One more thing and it's kinda immaterial, but what did you take with you when you left, Patrice, when you (inaudible)?

Patrice A picture that I had bought for David and then Michael wanted some clothes, so I had, uh, um, duffel bag with his clothes in it.

Rodger So Michael knew the trailer was gonna burn, too (inaudible)?

Patrice No...

Rodger (inaudible)

Patrice ...he had called me...

Rodger Ok. I understand.

Patrice ...and I asked him what he wanted and he said some outfit on a chair in the back bedroom. And I said, "which one," and he goes, "Well, just bring 'em all," 'cause he was gonna come by David's and pick 'em up. See Michael ne...Michael didn't know. And I, bottom line, I, I think Skate thought I wa...you know, that this wasn't gonna happen either. They both left.

Rodger Ok, Patrice, I don't have anything else.

Rick Is there anything that want to say for the record on your behalf?

Patrice I'm scared.

Rick I understand. For the record and on your behalf, my understanding is that you knew that Donald could die in there in his sleep, but you never meant for him to get beat up. Is that true?

[12] Patrice That's true.

Rick Ok.

Rodger And you knew about the trailer was gonna burn?

Patrice Yes, I did.

Rodger And that it was gonna be set on fire, is that right?

Patrice Yes.

Rick Ok, 'Trice, if you don't have anything else to say, I'm gonna stop the tape recorder. Ok? Rodger?

Rodger I have nothing further.

Rick I'm stopping the tape at approximately twelve minutes before five in the morning.

••••••

Supreme Court, U.S.
FILED
AUG 0 4 2003
OFFICE OF THE CLERK

No. 02-1371

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,
Petitioner,

v.

PATRICE SEIBERT,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

BRIEF FOR PETITIONER

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

KAREN K. MITCHELL*
Chief Deputy Attorney General
JAMES R. LAYTON
State Solicitor
SHAUN J MACKELPRANG
KAREN P. HESS
Assistant Attorneys General
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-0774

* Counsel of Record

58 pp

QUESTION PRESENTED

Is the rule "that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings," *Oregon v. Elstad*, 470 U.S. 298, 318 (1985), abrogated when the initial decision to withhold the *Miranda* warnings was intentional?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT 2

SUMMARY OF ARGUMENT 4

I. *MIRANDA* AND ITS PROGENY INTERPRET THE FIFTH AMENDMENT AS PROVIDING A NARROW EXCLUSIONARY RULE GOVERNING THE ADMISSIBILITY OF UNWARNED STATEMENTS MADE DURING CUSTODIAL INTERROGATION.. 8

A. The Fifth Amendment imposes a rule of admissibility that prohibits only the use of compelled statements at trial. 10

B. The *Miranda* exclusionary rule is narrow, only barring use of the unwarned statement in the prosecution's case in chief. 13

C. The holding in *Dickerson v. United States*, that *Miranda* is a "constitutional decision," does not undercut the narrow exclusionary rule articulated in *Miranda* and its progeny. 17

II. UNDER *OREGON V. ELSTAD*, THE ADMISSIBILITY OF WARNED STATEMENTS OBTAINED AFTER UNWARNED, CUSTODIAL INTERROGATION TURNS SOLELY UPON WHETHER THE WARNED STATEMENTS WERE "KNOWLINGLY AND VOLUNTARILY MADE.". 20

A. The "fruit of the poisonous tree" doctrine should not apply to subsequent, warned statements because there is no "poisonous tree" in the absence of an underlying constitutional violation, and the subsequent statement is the product of a separate act of volition and thus not the "fruit" of the previous interrogation. 21

B. The voluntary disclosure of a "guilty secret" during unwarned interrogation carries no constitutionally coercive "taint" because it is not the product of official coercion. 25

C. In deciding whether a subsequent, warned statement is admissible, a court focuses on the "totality of the circumstances" surrounding the warned statement and determines if it was knowingly and voluntarily made 26

III. INTENTIONALLY WITHHOLDING THE MIRANDA WARNINGS BEFORE QUESTIONING DOES NOT VIOLATE THE CONSTITUTION AND NEED NOT BE DETERRED ANY MORE THAN IT ALREADY IS BY THE EXCLUSION OF THE UNWARNED STATEMENT ITSELF FROM THE PROSECUTION'S CASE IN CHIEF. 28

A. Questioning before giving *Miranda* warnings does not warrant a presumption of compulsion as to the subsequent, fully-warned statement because it is not conduct that undermines the suspect's free will. 29

B. Focusing on the subjective intent of the officer ignores the relevant inquiry of the Fifth Amendment, improperly seeks to govern police conduct, and leads to disparate treatment of defendants 33

C. The deterrence rationale of the Fourth Amendment exclusionary rule should not be imported into the Fifth Amendment to create a broader *Miranda* exclusionary rule. 38

IV. RESPONDENT'S SUBSEQUENT, WARNED STATEMENT WAS VOLUNTARY AND WAS PROPERLY ADMITTED UNDER THE RATIONALE OF *OREGON V. ELSTAD*. 44

A. The officers did not engage in actually coercive conduct during the unwarned interrogation. 45

B. Respondent's second, warned statement was knowingly and voluntarily made. 47

CONCLUSION 49

TABLE OF AUTHORITIES

CASES **Page**

Ashcraft v. Tennessee, 322 U.S. 143 (1944) 45

Beckwith v. United States, 425 U.S. 341 (1976) . . . 34

Berkemer v. McCarty, 468 U.S. 420 (1984) 34

Carter v. Kentucky, 450 U.S. 288 (1981) 8

Chavez v. Martinez, 123 S.Ct. 1994, 2001 (2003) 5, 8, 12, 19, 22-23, 40

Colorado v. Connelly, 479 U.S. 157 (1986) 46

Colorado v. Spring, 479 U.S. 564 (1987) 45

Culombe v. Connecticut, 367 U.S. 568 (1961) 45

Connecticut v. Barrett, 479 U.S. 523 (1987) 18

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 27

Davis v. North Carolina, 384 U.S. 737 (1966) 27

Dickerson v. United States, 530 U.S. 428 (2000) 6, 17-19, 21, 27, 39

Griffin v. California, 380 U.S. 609 (1965) 8

Harris v. New York, 401 U.S. 222 (1971) 6, 13-14, 39-40

Jackson v. Denno, 378 U.S. 368 (1964) 45

Kastigar v. United States, 406 U.S. 441 (1972) 12

Lefkowitz v. Turley, 414 U.S. 70 (1973) 9

Malloy v. Hogan, 378 U.S. 1 (1964) 27

Michigan v. Tucker, 417 U.S. 433 (1974) 6, 14-15, 18-19, 39

Minnesota v. Murphy, 465 U.S. 420 (1984) 9

Miranda v. Arizona, 384 U.S. 436 (1966) . . . . *passim*

Moran v. Burbine, 475 U.S. 412 (1986) 12, 36-37, 43-44, 48

Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964) 12

New York v. Quarles, 467 U.S. 649 (1984) 12, 15-16, 18, 35, 40

Oregon v. Elstad, 470 U.S. 298 (1985) . . . . . *passim*

Oregon v. Hass, 420 U.S. 714 (1975) 6, 14, 39

Rhode Island v. Innis, 446 U.S. 291 (1980) 34

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) . . 27

Scott v. United States, 436 U.S. 128 (1978) 35

Stansbury v. California, 511 U.S. 318 (1994) 34

State v. Rousan, 961 S.W.2d 831 (1998) 45

Stein v. New York, 346 U.S. 156 (1953) 45

United States v. Balsys, 524 U.S. 666 (1998) 9

United States v. Bayer, 331 U.S. 532 (1947) . . 25, 33

United States v. Carter, 884 F.2d 368 (8th Cir. 1989) 4, 30

United States v. Ceccolini, 435 U.S. 268 (1978) . . . 24

United States v. DeSumma, 272 F.3d 176 (3rd Cir. 2001) 16

United States v. Elie, 111 F.3d 1135 (4th Cir. 1997) 16

United States v. Esquilin, 208 F.3d 315 (1st Cir. 2000) 26, 30

United States v. Faulkingham, 295 F.3d 85 (1st Cir. 2002) 16

United States v. Gupta, 183 F.3d 615 (7th Cir. 1999) 17

United States v. Mendenhall, 446 U.S. 544 (1980) . 35

United States v. Orso, 266 F.3d 1030 (9th Cir. en banc 2001) 16, 30

United States v. Patane, 304 F.3d 1013 (10th Cir. 2002) 18

United States v. Robinson, 414 U.S. 218 (1973) . . . 35

United States v. Sterling, 283 F.3d 216 (4th Cir. 2002) 16

United States v. Verdugo-Urquidez, 494 U.S.259 (1990) 5, 9, 11

Watson v. Detella, 122 F.3d 450 (7th Cir. 1997) 17, 46

Whren v. United States, 517 U.S. 806 (1996) 35

Withrow v. Williams, 507 U.S. 680 (1993) 11, 17

Wong Sun v. United States, 371 U.S. 471 (1963) 21-22, 32, 47-48

CONSTITUTIONAL AND STATUTORY AUTHORITY

42 U.S.C. § 1983 22

Constitution of the United States, Amendment V ... 2

SCHOLARLY AUTHORITIES

Clymer, Steven D., *Are Police Free To Disregard Miranda?*, 112 YALE L.J. 447 (2002) 11

FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (4th ed. 2001) 41

No. 02-1371

In The Supreme Court of the United States

STATE OF MISSOURI,
Petitioner,

v.

PATRICE SEIBERT,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Missouri Supreme Court (Petition Appendix A1-A26), is reported at 93 S.W.3d 700 (Mo. banc 2002).

JURISDICTION

The judgment of the Missouri Supreme Court was entered on December 10, 2002 (Pet. App. A1). The petition for certiorari was filed on March 10, 2003, and was granted on May 19, 2003. This Court has jurisdiction under 28 U.S.C. § 1257(a) (2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

STATEMENT

This case seeks to clarify whether the bright-line rule established in *Oregon v. Elstad*, 470 U.S. 298 (1985) – "that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings" – is abrogated in cases where the initial decision to withhold the *Miranda* warnings was intentional.

This case arose out of the murder of Donald Rector, a young man who was staying in respondent's home in February 1997 (Tr. 855). Respondent's young son, Jonathan Seibert, who suffered from cerebral palsy and blindness, died in his bed of an unknown cause (J.A. 66; State's Exhibit 42; Tr. 757-758, 854, 836-837). When respondent discovered this, she was distraught (Tr. 836, 856, 858). Because of sores on his body, respondent feared being accused of abusing or neglecting her child (J.A. 67; State's Exhibit 42; Tr. 836-837, 858).[1]

Rather than report Jonathon's death, respondent arranged for another son, Darian, and Derrick Roper, a friend, to burn down her trailer home with Jonathan's body inside because, as she later told the police, "that'd been the easiest way to dispose of the body" (J.A. 67-68,

---

[1] An autopsy revealed that Jonathan was malnourished (Tr. 754).

70; State's Exhibit 42; Tr. 858-860, 903-904). To make it appear that Jonathan had not been left home alone and that his death was accidental, they concluded that Donald Rector would have to be in the home when it burned (J.A. 70, 72; State's Exhibit 42; Tr. 837-840, 858-861, 908). The plan was carried out on the evening of February 12, 1997; Rector died in the fire (J.A. 71; State's Exhibit 42; Tr. 757). Darian suffered serious burns and was hospitalized (J.A. 14-15, 25; Tr. 850).

The police obtained information from Derrick Roper implicating respondent (J.A. 46). At about 3:00 a.m., after talking to Roper, the police went to the hospital where respondent was staying with Darian, and they awakened and arrested her (J.A. 17, 26-27, 45-46, 51-52). The arresting officer transported respondent to the police department and placed her in a small interview room (J.A. 17-18, 45-46, 55). After about fifteen to twenty minutes alone, at about 3:45 a.m., respondent was questioned for about twenty to thirty minutes without being advised of the *Miranda* warnings (J.A. 18, 28, 30-31, 34, 55, 58). At this first interview, which was not recorded, the officer intentionally withheld the *Miranda* warnings, as he had been trained to do as part of a two-stage interrogation technique (J.A. 18, 27-34, 52, 59). Respondent made incriminating statements during the first interrogation (J.A. 35-37, 59-60).

Respondent was then given a fifteen- to twenty-minute break, in which she was given a cup of coffee and allowed to smoke a cigarette (J.A. 58-59). At 4:30 a.m., using a standard form, the officers gave the *Miranda* warnings (J.A. 19-20, 46, 48, 63-66; State's Exhibits 37, 42). Respondent indicated that she understood the warnings; she initialed each warning, signed the form, and said that she wanted to talk (J.A. 19-20, 46-48, 63-66; State's Exhibits 37, 42).

During the first, unwarned interview, when asked

if Donald Rector was supposed to die in the fire, respondent started to cry, and the questioning officer "[g]ently" squeezed her arm (J.A. 59). Throughout the interrogations, the officer sat fairly close to respondent and maintained eye contact, but at no time during either interrogation was respondent threatened in any way; nor were any promises made to her to induce her statements (J.A. 21-22, 47, 56-57; State's Exhibit 42). Respondent was questioned in low, conversational tones, and she was not subjected to any physical abuse (J.A. 21-22). At no time did respondent invoke her right to remain silent or request an attorney (J.A. 21).

The contents of the second, warned interview, were admitted into evidence at trial during the state's case in chief despite respondent's motion to suppress (J.A. 40, 42, 50-51).[2] On appeal, a four-member majority of the Supreme Court of Missouri, relying in part upon the Eighth Circuit's decision in *United States v. Carter*, 884 F.2d 368 (8th Cir. 1989), held that because the failure to give the *Miranda* warnings was intentional, the second confession should have been suppressed as the "product of the invalid first statement" (*i.e.*, the fruit of the poisonous tree) (Pet. App. A1). Three dissenting judges, citing *Oregon v. Elstad*, would have affirmed the ruling of the trial court, concluding that the officer's decision to withhold warnings did not render respondent's subsequent, fully-warned statement inadmissible (Pet. App. A15-A21).

SUMMARY OF ARGUMENT

Respondent's second, fully-warned confession may be excluded from evidence only if the Court: (1) holds that engaging in custodial interrogation without administering *Miranda* warnings is a constitutional violation that must be deterred by adopting a broad *Miranda* exclusionary rule that bars the admission of both unwarned and subsequent, fully-warned statements; or (2) holds that the psychologically coercive effect of a voluntary, unwarned statement, though not the product of official coercion, so "taints" the subsequent, warned statement as to render it involuntary. The Court previously rejected both of these alternatives in *Oregon v. Elstad*, 470 U.S. 298 (1985), and there is nothing about the intentional nature of the initial decision to withhold *Miranda* warnings that should alter the *Elstad* analysis. A broad reading of the *Miranda* exclusionary rule in this context is not necessary to fulfill the core purpose of the Fifth Amendment privilege.

[2] At trial, in cross-examining the officer, respondent elicited some of the content of her first, unwarned confession (J.A. 59).

The Fifth Amendment to the United States Constitution guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court crafted a rule that provided expanded protection of the Fifth Amendment right by attaching a "presumption of compulsion" to any unwarned statement and requiring its exclusion. 384 U.S. at 467-473; *Oregon v. Elstad*, 470 U.S. at 307. But the Fifth Amendment is a "trial right," *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990); the unwarned statement, at least absent actual coercion, must be used at trial before there is an actual violation of the Fifth Amendment privilege. *See Chavez v. Martinez*, 123 S.Ct. 1994, 2001 (2003) (plurality opinion). The Fifth Amendment is, in essence, a rule of admissibility, and it is not primarily concerned with shaping police conduct.

Since *Miranda*, this Court has, on several occasions, addressed the breadth of the *Miranda* exclusionary rule. In each case the Court has declined to expand the deterrence rationale of the Fourth Amendment into the Fifth Amendment and found the *Miranda* exclusionary rule to

be narrow, excluding only the defendant's unwarned statement from the prosecution's case in chief. *See Harris v. New York*, 401 U.S. 222 (1971); *Michigan v. Tucker*, 417 U.S. 433 (1974); *Oregon v. Hass*, 420 U.S. 714 (1975); *Oregon v. Elstad*. In one instance the Court even crafted an exception allowing the admission of unwarned statements to prove the state's case. *See New York v. Quarles*, 467 U.S. 649 (1984). This narrow interpretation of the *Miranda* exclusionary rule is appropriate because the decision to withhold the warnings, an act that is not itself a constitutional violation, results in only a presumption of compulsion. The Fifth Amendment protects against the use of "compelled" statements, and unwarned statements are not necessarily involuntary. *Oregon v. Elstad*, 470 U.S. at 310; *Miranda*, 384 U.S. at 456-458.

In *Dickerson v. United States*, 530 U.S. 428, 444 (2000), this Court characterized the *Miranda* safeguards as "constitutional" in character. But the fact that the warnings are constitutional does not render the decision to withhold them a constitutional violation, nor does it alter the analysis this Court employed in *Miranda* and its progeny.

One of those progeny is *Oregon v. Elstad*. Noting the fundamental difference between unreasonable searches and seizures and unwarned interrogation, the Court in *Elstad* refused to extend the Fourth Amendment's "fruit of the poisonous tree" doctrine to the Fifth Amendment context. *Elstad*, 470 U.S. at 306-309. This was appropriate, because the "fruits" analysis requires the existence of a constitutional violation (the "poisonous tree") that there is a compelling need to deter. But where there is only unwarned questioning, absent coercive conduct, there is no constitutional violation. Under such circumstances, there is no compelling reason to extend the deterrence rationale into the Fifth Amendment context. And even if *Elstad* is not read as

a categorical rejection of a broad *Miranda* exclusionary rule based on the "fruits" doctrine, it should be read to reject the application of the doctrine when the alleged "fruit" is a subsequent, fully-warned statement.

In *Elstad*, the Court also rejected the argument that a "subtle form of lingering compulsion" – an allegedly coercive "taint" – could result from the initial, unwarned, "cat out of the bag" statement. *Id.* at 310-312. The Court held that the subsequent administration of warnings "cure[d] the condition that rendered the unwarned statement inadmissible" and restored the suspect's free will. *Id.* at 310-311. Thus, when considering whether to admit a subsequent, warned statement, the focus is on the subsequent statement and whether it was knowingly and voluntarily made. *Id.* at 318. Only if the initial statement was actually involuntary can it "taint" and render the subsequent, warned statement involuntary.

The decision to withhold warnings is not a "deliberately coercive or improper tactic," *id.* at 314, that needs to be deterred any more than it already is by excluding the unwarned statement from the prosecution's case in chief. The subjective intent of the officer cannot have any effect on the suspect's decision to either make a statement or waive her Fifth Amendment privilege once warned. And the adoption of a subjective intent analysis would both stray from the core goal of the Fifth Amendment (to exclude compelled testimony) and lead to disparate results for defendants who, except for the subjective intent of the officer, make unwarned statements under exactly the same objective circumstances. This Court should decline to adopt rules, at least in the Fifth Amendment context, whose principal aim is to mold the conduct of police officers – especially when that conduct has a valid law-enforcement justification. *Miranda* and its progeny, particularly *Elstad*, already adequately deter improper police conduct (by inducing

officers to administer the warnings or, alternatively, treat suspects fairly to ensure that subsequent, warned statements are admissible), and the exclusion of the unwarned statement from the prosecution's case is a sufficient remedy.

ARGUMENT

I. *MIRANDA* AND ITS PROGENY INTERPRET THE FIFTH AMENDMENT AS PROVIDING A NARROW EXCLUSIONARY RULE GOVERNING THE ADMISSIBILITY OF UNWARNED STATEMENTS MADE DURING CUSTODIAL INTERROGATION.

The Self-Incrimination Clause of the Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." This privilege against self-incrimination was born out of a desire to protect the people of this nation against the invidious practice of coercing individuals to testify against themselves. *See Miranda v. Arizona*, 384 U.S. 436, 458-460 (1966). The privilege is a precious right, "fixed in our Constitution only after centuries of persecution and struggle." *Id.* at 442.

As the text of the amendment reveals, the core protection of the Fifth Amendment is that criminal defendants cannot be compelled to testify against themselves at a criminal trial. *See Chavez v. Martinez*, 123 S.Ct. 1994, 2000-2001 (2003) (plurality opinion). To fully effectuate that guarantee, this Court has crafted rules that uphold that core protection, and, at times, this Court has crafted rules that provide expanded protection of the right. *See Carter v. Kentucky*, 450 U.S. 288, 300 (1981) (a judge must instruct the jury not to draw an adverse inference from a defendant's failure to testify); *Griffin v. California*, 380 U.S. 609, 614 (1965) (no penalty may be imposed on a defendant for refusing to testify at a criminal trial).

Under some circumstances, the privilege can be invoked outside a criminal trial. It has long been recognized that the privilege "not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)). But the Fifth Amendment is a "trial right." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990). Thus, while the right may be invoked outside of the criminal trial, to invoke the privilege, the individual must "demonstrate that any testimony he might give . . . could be used in a criminal proceeding against him[.]" *United States v. Balsys*, 524 U.S. 666, 671-672 (1998).

Because interrogation is often intended to obtain statements that can be "used in a [later] criminal proceeding," the Court has crafted rules governing the admissibility of such statements to guard against later violations of the Fifth Amendment at trial. In *Miranda v. Arizona*, the Court set forth "safeguards" – the "*Miranda*" warnings – that must be utilized to protect the core guarantee of the Fifth Amendment. *Miranda v. Arizona*, 384 U.S. at 467-473. The Court acknowledged that *Miranda* (and its companion cases) did not necessarily involve "involuntary" confessions; nevertheless, the Court concluded that the risk of introducing a compelled statement was unacceptably high and necessitated the use of explicit warnings to ensure that a decision to speak was "the product of free choice." *Id.* at 457.

In other words, in the absence of warnings and a valid waiver, the Court concluded that any statement obtained during custodial interrogation would carry a "presumption of compulsion" and would not be admissible in the prosecution's case in chief. *See*

Oregon v. Elstad, 470 U.S. 298, 307 (1985) ("Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*."). As the Court stated in *Miranda*:

> After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

384 U.S. at 479. Again, the *Miranda* exclusionary rule operates regardless of a statement's otherwise voluntary nature. *See Oregon v. Elstad*, 470 U.S. at 306-307.

Thus, while the Fifth Amendment privilege must be jealously guarded – even by the implementation of rules allowing individuals to invoke it long before trial – its basic guarantee is inextricably tied to prohibiting the *use* of compelled testimony at trial. In short, only when a person's statements are compelled in a constitutionally impermissible fashion should those statements be excluded from the prosecution's case. Otherwise, a person has not been "compelled" to be a "witness" against himself "in any criminal case."

A. The Fifth Amendment imposes a rule of admissibility that prohibits only the use of compelled statements at trial.

In discussing the Fifth Amendment, this Court has made clear that it is the *use* of compelled statements, not their acquisition, that the privilege prohibits: "The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants." *United States v. Verdugo-Urquidez*, 494

U.S. at 264. When later quoting *Verdugo-Urquidez*, this Court emphasized, with italics, that the Fifth Amendment privilege is "a fundamental *trial* right." *Withrow v. Williams*, 507 U.S. 680, 691 (1993) (internal quotation marks omitted). Thus, "[a]lthough conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." *United States v. Verdugo-Urquidez*, 494 U.S. at 264. The text of the Fifth Amendment demonstrates that compulsion alone does not violate the Fifth Amendment privilege against self-incrimination. In essence, the Fifth Amendment is a constitutionally created exclusionary rule limiting the use of compelled statements. *See* Steven D. Clymer, *Are Police Free To Disregard Miranda?*, 112 YALE L.J. 447, 476 (2002).

In *Miranda*, the Court effectively expanded the protection of the Fifth Amendment privilege by attaching a presumption of coercion to unwarned statements that merely jeopardized the core guarantee against compelled self-incrimination. But this Court did not alter the fundamental nature of the Fifth Amendment privilege. *Miranda* merely created a limited rule of exclusion that protects the core guarantee of the Fifth Amendment: that no compelled testimony will be used against the accused at trial. Indeed, at the outset, the Court acknowledged that its opinion addressed the "*admissibility* of statements obtained from an individual who is subjected to custodial police interrogation[.]" 384 U.S. at 439 (emphasis added). Thus, the rules announced by *Miranda* and its progeny operate to prohibit the use of presumptively compelled statements, but they cannot be expanded to achieve purposes that are beyond the scope of the Fifth Amendment privilege.

In that vein, the *Miranda* exclusionary rule was not designed to delineate the pattern of every criminal investigation; it was not designed to impose a code of conduct on officers; and, in fact, the Court lacks the

authority to impose such a code. *See Moran v. Burbine*, 475 U.S. 412, 425 (1986) ("Nothing in the Constitution vests in us the authority to mandate a code of behavior for state officials wholly unconnected to any federal right or privilege."). Instead, with regard to law enforcement, the *Miranda* exclusionary rule performs the valuable function of informing officers of the parameters they must work within to obtain *admissible* evidence.

Thus, although it is generally necessary for police to give the *Miranda* warnings to obtain statements admissible at trial, a decision to withhold the warnings does not by itself violate the Fifth Amendment. *Chavez v. Martinez*, 123 S.Ct. at 2001 (plurality opinion). The exclusionary rule constructed and refined by *Miranda* and its progeny, like the privilege from which it springs, is a rule of admissibility.[3] Consequently, while safeguards can be erected prior to trial to secure the "trial right" against self-incrimination, nothing in the Fifth Amendment supports the creation of any independent right or protection against particular kinds of police conduct or otherwise supports regulation of police conduct as a constitutional end in itself. The constitutional right can only be violated at trial.

In sum, the *Miranda* exclusionary rule was designed to secure the Fifth Amendment privilege against self-

[3] That the Fifth Amendment privilege prohibits use is evident in the application of the immunity doctrine, which permits the government to compel answers to questions by use of an express threat of contempt, despite an assertion of the Fifth Amendment privilege, if the government guarantees that the statement and anything derived from it will not be used in the criminal prosecution. *Kastigar v. United States*, 406 U.S. 441 (1972). A broader exclusionary rule is, perhaps, warranted in the immunity cases because in such cases, the individual is subjected to "'the cruel trilemma of self-accusation, perjury, or contempt.'" *See New York v. Quarles*, 467 U.S. 649, 669-670 (1984) (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964)) (O'Connor, J., concurring in part and dissenting in part).

incrimination. It was not designed to deter a specific type of official misconduct, *i.e.*, it was not designed to prohibit unwarned interrogation altogether; rather, it was designed to safeguard the core guarantee of the Fifth Amendment against the admission of potentially compelled statements at trial. Indeed, while recognizing the "potentiality for compulsion," the Court acknowledged that the cases before it probably did not run afoul of the voluntariness test developed in its earlier cases. *Miranda v. Arizona*, 384 U.S. at 457 ("In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. . . . To be sure, the records do not evince overt physical coercion or patent psychological ploys."). In short, *Miranda* did not create a rule that police officers may not engage in unwarned, custodial interrogation. Rather, consistent with the Fifth Amendment guarantee, it created a rule that excludes unwarned statements from the prosecution's case in chief because unwarned statements are burdened with a presumption of compulsion.

B. The *Miranda* exclusionary rule is narrow, only barring use of the unwarned statement in the prosecution's case in chief.

Although the *Miranda* exclusionary rule limits the admissibility of unwarned statements, a series of post-*Miranda* decisions demonstrates that the rule is quite narrow in its application. It ordinarily bars the use of unwarned statements in the prosecution's case in chief. But it does not bar all use of evidence obtained without the administration of the required warnings. Indeed, the Court recognized in *Harris v. New York*, 401 U.S. 222 (1971), that "[i]t does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards." 401 U.S. at 224.

In *Harris*, the Court acknowledged limits on the *Miranda* exclusionary rule. There, a police officer gave the suspect incomplete warnings. *Id.* at 224. The Court held that although *Miranda* prohibited the prosecution from making its case with an improperly warned statement, evidence obtained in the absence of complete warnings could be used to impeach the defendant's credibility. *Id.* at 224-226. Similarly, in *Oregon v. Hass*, 420 U.S. 714 (1975), where a defendant's statement was ruled inadmissible in the prosecution's case because it came after his request for an attorney, the Court ruled that the statement was nevertheless admissible to impeach his testimony because it was not actually "involuntary or coerced." *Id.* at 715-716, 722-723.

A few years after *Harris*, the Court addressed another limitation question: whether *Miranda's* rule excludes not just the unwarned statement, but also evidence derived from it. The issue in *Michigan v. Tucker*, 417 U.S. 433 (1974), was whether the testimony of a third party should be excluded when the third party's identity was discovered only because of a statement made during an interrogation in which the defendant had received defective *Miranda* warnings. 417 U.S. at 435-437. In finding the evidence admissible, the Court held that the prohibition against using unwarned statements "to prove the prosecution's case at trial," did not extend to derivative evidence under the facts of that case. *Id.* at 445, 450-452. *Miranda's* requirements were "fully complied with . . . [because] respondent's statements . . . were not admitted against him at trial." *Id.* at 445. And, in rejecting the exclusion of the evidence based on the "fruit of the poisonous tree" doctrine, the Court drew a distinction between an "actual[] infringe[ment]" of the Fourth Amendment and a "depart[ure]" from the *Miranda* safeguards which are intended to safeguard the Fifth Amendment privilege.

Id. at 445-446.[4]

About a decade later, relying in part on the analysis of *Tucker*, this Court again refused to exclude evidence other than the unwarned statement as "fruit of the poisonous tree." The question before the Court was whether an initial failure to advise a defendant of the *Miranda* warnings rendered a subsequent, fully-warned statement inadmissible. *See Oregon v. Elstad*, 470 U.S. 298, discussed in part II, *infra*.

Meanwhile, in another case, citing the demands of "public safety," the Court refused to exclude both a statement and physical evidence derived from the statement, even though both were obtained prior to administering *Miranda* warnings. In *New York v. Quarles*, 467 U.S. 649, a woman told police officers that she had been raped, described the assailant, and told them that he was in a nearby grocery store, carrying a gun. 467 U.S. at 651-652. One of the officers chased the defendant through the store and, when he apprehended him, the defendant was wearing an empty holster. *Id.* at 652. The officer asked where the gun was and the defendant revealed its location. *Id.* The officer retrieved the gun, formally arrested the defendant, and read him the *Miranda* warnings. *Id.* This Court crafted an exigency-based "'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence," reasoning that officers may otherwise hesitate to ask questions necessary to protect public safety out of a concern that any evidence uncovered will be inadmissible. *Id.* at 655-658.

---

[4] While the facts in *Tucker* did not warrant the application of the exclusionary rule for its deterrence value, the Court left open the possibility that different facts could warrant an extension of the rule to the Fifth Amendment context. *Michigan v. Tucker*, 417 U.S. at 446-447. *But see* pp. 38-44, *infra*.

In a separate opinion which foreshadowed *Oregon v. Elstad*, Justice O'Connor, addressing the admissibility of the gun, advocated a bright-line rule that physical evidence obtained as a result of a confession after unwarned questioning be admissible. *Id.* at 660 (concurring in part and dissenting in part). She contrasted the mere failure to warn with "abusive police practices." *Id.* at 671-672. The latter implicates due process concerns and justifies a broader exclusionary rule; however, "where the accused proves only that the police failed to administer the *Miranda* warnings, exclusion of the statement itself is all that will and should be required." *Id.* at 672. "Limitation of the *Miranda* prohibition to testimonial use of the statements themselves adequately serves the purposes of the privilege against self-incrimination." *Id.*

Consistent with *Tucker*, *Quarles*, and *Elstad*, most circuit courts of appeals that have confronted the issue have read *Miranda's* progeny to generally permit the admission of the alleged "fruits" of statements obtained without full *Miranda* warnings. *See United States v. Faulkingham*, 295 F.3d 85 (1st Cir. 2002) (derivative evidence not excluded when the failure to give *Miranda* warnings was negligent); *United States v. DeSumma*, 272 F.3d 176 (3rd Cir. 2001), *cert. denied*, 535 U.S. 1028 (2002) (the "fruits" doctrine would not operate to exclude derivative physical evidence when a defendant gives an otherwise voluntary statement without *Miranda* warnings); *United States v. Sterling*, 283 F.3d 216 (4th Cir. 2002), *cert. denied*, 536 U.S. 931 (2002) (the "fruits" doctrine would not operate to exclude derivative physical evidence); *United States v. Elie*, 111 F.3d 1135, 1141-1142 (4th Cir. 1997) (fruits of violations of *Miranda* are admissible); *United States v. Orso*, 266 F.3d 1030, 1034-1035, 1039 (9th Cir. 2001) (en banc), *cert. denied*, 123 S.Ct. 125 (2002) (the lack of *Miranda* warnings alone does not require suppression of a subsequent warned statement); *see also United States v. Gupta*, 183 F.3d

615, 618-619 (7th Cir. 1999) (a second, fully warned statement was admissible under *Elstad* because it was voluntary); *Watson v. Detella*, 122 F.3d 450 (7th Cir. 1997) (same).

Read together, *Miranda* and its progeny refuse to apply a broad, Fourth Amendment-style exclusionary rule, instead interpreting the Fifth Amendment privilege as simply the right not to have a presumptively compelled statement used against the defendant at trial to prove the state's case. The constitutional safeguards set out in *Miranda* protect "a fundamental *trial* right." *Withrow v. Williams*, 507 U.S. at 691 (internal quotation marks omitted). And it is this core guarantee of the Fifth Amendment – that there will be no compelled self-incrimination at trial – which must be at the center of any attempt to craft constitutional, evidentiary rules.

C. The holding in *Dickerson v. United States*, that *Miranda* is a "constitutional decision," does not undercut the narrow exclusionary rule articulated in *Miranda* and its progeny.

The narrow reading of the *Miranda* exclusionary rule was implicitly confirmed by the Court in *Dickerson v. United States*, 530 U.S. 428, 432 (2000): "*Miranda* and *its progeny* in this Court *govern* the *admissibility* of statements made during custodial interrogation . . ." (Emphasis added.) In concluding that Congress could not overrule *Miranda*, the Court discussed the constitutional underpinnings of the *Miranda* decision and concluded that in *Miranda* the Court announced what was, and had been treated as, a "constitutional rule." *Id.* at 440-444. But characterizing the *Miranda* decision as "constitutional" does not change the character of the Fifth Amendment privilege. And it does not require a broadening of *Miranda*'s exclusionary rule.

Indeed, in *Dickerson*, the Court stated that it "need

not go further than *Miranda* to decide this case." *Id.* at 442. And, as stated above, it affirmed the continuing validity of *Miranda* and its progeny. The decision in *Dickerson* thus preserved the various limitations and exceptions to the general rule of *Miranda*. Any suggestion that *Dickerson* somehow altered the breadth of the *Miranda* exclusionary rule, therefore, goes beyond the express language of the Court's opinion.

Admittedly, *Dickerson* did provide fodder for those claiming a broader *Miranda* exclusionary rule. They allege that *Dickerson* damaged the underpinnings of post-*Miranda* decisions that seemed to indicate that the *Miranda* warnings were not required by the Constitution. Before *Dickerson*, the Court had referred to the *Miranda* warnings as "prophylactic" in nature. *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (stating that "the *Miranda* Court adopted prophylactic rules designed to insulate the exercise of Fifth Amendment rights"); *New York v. Quarles*, 467 U.S. at 653 (referring to the *Miranda* warnings as "prophylactic"); *Michigan v. Tucker*, 417 U.S. at 444 (stating that the *Miranda* warnings are "not themselves rights protected by the Constitution").[5] But "constitutional" and "prophylactic" are not mutually exclusive terms.

A constitutional rule can be "prophylactic" or preventative in nature. Before *Miranda*, the principal issue in cases addressing the admissibility of allegedly coerced statements was whether the defendant's state-

[5] Due to a perceived difference between "constitutional" and "prophylactic" rules (and there may be instances when a prophylactic rule is *not* a constitutional one), the Tenth Circuit has concluded that, while *Elstad* survived *Dickerson* in a "fundamentally altered" landscape, derivative physical evidence must be excluded if it is obtained after a *Miranda* violation. *United States v. Patane*, 304 F.3d 1013, 1024, 1029 (10th Cir. 2002), *cert. granted*, 71 U.S.L.W. 3530 (U.S. April 21, 2003) (No. 02-1183).

ment was voluntary. *Michigan v. Tucker*, 417 U.S. at 441. *Miranda* shifted the focus to the issue of whether the defendant validly waived his Fifth Amendment right against self-incrimination. *See id.* at 442-443. For a waiver to be valid, it must be "voluntarily, knowingly and intelligently" made. *Id.* at 444 (quoting *Miranda v. Arizona*, 384 U.S. at 444). Adequate warnings help to satisfy these requirements and prevent violations of the Fifth Amendment. Thus, the constitutional safeguards set out in *Miranda* are prophylactic because they assure a valid waiver, and prevent a subsequent violation, of the underlying constitutional right. The warnings are a constitutional rule that safeguard a constitutional right, but they themselves are not constitutional rights. *Chavez v. Martinez*, 123 S.Ct. at 2003-2004 (plurality opinion) (rejecting a claim for damages under 42 U.S.C. § 1983 because compulsive questioning without more does not violate the Self-Incrimination clause); *Michigan v. Tucker*, 417 U.S. at 444 (the *Miranda* warnings are "not themselves rights protected by the Constitution").

Accordingly, even in the wake of *Dickerson*, there is no reason to expand the reach of *Miranda*'s exclusionary rule. The Fifth Amendment privilege is served by *Miranda* and its progeny – *see Oregon v. Elstad*, 470 U.S. at 306 ("The *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment") – and the Fifth Amendment makes no demand other than the exclusion of compelled testimony from the prosecution's case in chief. Thus, to the extent that the application of *Miranda*'s rule sometimes exceeds the demands of the Fifth Amendment (which excess simply provides a heightened level of constitutional protection), it is entirely proper to limit the application of such a rule under certain circumstances – as this Court did in *Oregon v. Elstad*.

II. UNDER *OREGON V. ELSTAD*, THE ADMISSIBILITY OF WARNED STATEMENTS OBTAINED AFTER UNWARNED, CUSTODIAL INTERROGATION TURNS SOLELY UPON WHETHER THE WARNED STATEMENTS WERE "KNOWINGLY AND VOLUNTARILY MADE."

In *Elstad*, as in this case, the Court faced a situation in which there had been two interrogations – one before and one after the administration of the *Miranda* warnings. Only the post-warning statement was admitted at trial. The Court concluded that the Fourth Amendment "fruits" doctrine did not apply in the Fifth Amendment context, where there was no underlying constitutional violation, and thus rejected the defendant's efforts to have a post-warning statement excluded as the "fruit of the poisonous tree." *Elstad*, 470 U.S. at 305-309. "[T]he *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted." *Id.* at 307. The Court explained that when the alleged "fruit" of the poisonous tree is merely the accused's subsequent "voluntary testimony," there is no justification for a "broader [exclusionary] rule." *Id.* at 308.

The Court did not ignore the question raised by the initial absence of *Miranda* warnings. Having rejected the "poisonous tree" approach, the Court considered whether the initial, unwarned statement so tainted the subsequent, fully warned statement as to render it involuntary. *Id.* at 308-314. The Court held, however, that "[o]nce warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities." *Id.* at 308. Thus, "[n]o further purpose is served by imputing 'taint' to subsequent statements obtained pursuant to a voluntary and knowing waiver." *Id.* at 318. To return again to the words of *Miranda*, the holding in *Elstad* was that the

mere existence of a previous unwarned statement does not prevent a defendant's subsequent, warned statement from "truly be[ing] the product of his free choice." *Miranda v. Arizona*, 384 U.S. at 458. That is – and should remain – the rule.

A. The "fruit of the poisonous tree" doctrine should not apply to subsequent, warned statements because there is no "poisonous tree" in the absence of an underlying constitutional violation, and the subsequent statement is the product of a separate act of volition and thus not the "fruit" of the previous interrogation.

The "fruit of the poisonous tree" doctrine arose in Fourth Amendment jurisprudence to afford a remedy for a completed constitutional violation. *See Oregon v. Elstad*, 470 U.S. at 305-306 (citing *Wong Sun v. United States*, 371 U.S. 471 (1963)). In refusing to apply the "fruits" doctrine to the asserted *Miranda* violations in both *Michigan v. Tucker* and *Oregon v. Elstad*, the Court repeatedly acknowledged the difference between actual Fourth Amendment violations and unwarned interrogation under the Fifth Amendment

In *Dickerson v. United States*, this Court commented upon the holding in *Elstad* and stated:

> Our decision in that case – refusing to apply the traditional "fruits" doctrine developed in Fourth Amendment cases – does not prove that *Miranda* is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment.

Id. at 441. This observation assumed the constitutional nature of the *Miranda* rules, but it implicitly reaffirmed earlier descriptions of the *Miranda* rule as a safeguard intended to assure the valid waiver of the Fifth

Amendment privilege. Thus, while the *Miranda* rule is a constitutional rule, the failure to adhere to the safeguard alone is not a constitutional violation that supports the application of the broader "fruits" exclusionary rule in the Fifth Amendment context. *See Oregon v. Elstad*, 470 U.S. at 308 ("Since there was no actual infringement of the suspect's constitutional rights, the case was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed.").

That mere questioning in the absence of *Miranda* warnings does not constitute a completed constitutional violation was largely reaffirmed in *Chavez v. Martinez*, 123 S.Ct. 1994 (2003). Chavez subjected Martinez to unwarned questioning; however, Martinez was not charged with any crime, and his statements were never used against him in any criminal proceeding. 123 S.Ct. at 1999-2000 (plurality opinion). In seeking damages under 42 U.S.C. § 1983, he nevertheless claimed that a law enforcement officer had violated his Fifth Amendment rights. *Id.* at 2000. In an opinion delivered by Justice Thomas, a plurality of the Court stated that "[t]he text of the Self-Incrimination Clause simply cannot support the . . . view that the mere use of compulsive questioning, without more, violates the Constitution." *Id.* at 2001. In other words, because the defendant's statements were never used at trial, there was no Fifth Amendment violation to remedy.

Similarly, in a separate opinion delivered by Justice Souter, two justices rejected the claim that "questioning alone was a completed violation" of the Fifth Amendment. *Id.* at 2006-2007 (Souter, J., opinion concurring in judgment). Expanded protection of the Fifth Amendment privilege could be warranted if "the core guarantee [of the Fifth Amendment], or the judicial capacity to protect it, would be placed at some risk in the absence of such complementary protection." *Id.*

But, seeing no such danger in that case, and foreseeing endless civil claims arising out of alleged violations of *Miranda*, the opinion concluded that the petitioner had failed to "make the 'powerful showing,' subject to a realistic assessment of costs and risks, necessary to expand protection of the privilege against compelled self-incrimination to the point of civil liability he asks us to recognize here." *Id.* at 2007.

Concurring in part and dissenting in part, two justices agreed "that failure to give a *Miranda* warning does not, without more, establish a completed violation when the unwarned interrogation ensues." *Id.* at 2013 (Kennedy, J., concurring in part and dissenting in part). They opined, however, that "[a] constitutional right is traduced the moment torture or its close equivalents are brought to bear," *i.e.*, that a violation can occur in the police station if there is actual coercion and not only when a compelled statement is introduced at trial. *Id.* Likewise, Justice Ginsburg opined that "the Self-Incrimination Clause applies at the time and place police use severe compulsion to extract a statement from a suspect." *Id.* at 2018 (Ginsburg, J., concurring in part and dissenting in part).

The varying approaches set out in *Chavez* all relate to the analysis in *Elstad* and they find a workable – if not wholly unified – synthesis there. In *Elstad*, there was brief, unwarned interrogation of the defendant. 470 U.S. at 301. Because the initial, unwarned interrogation violated *Miranda*'s rules, any statement obtained thereby had to be excluded from the prosecution's case in chief. *Id.* at 317. But, absent actually coercive police conduct (during either the initial and subsequent interrogation), the subsequent, warned confession was admissible if knowingly and voluntarily made (despite the earlier lack of *Miranda* warnings). *Id.* at 317-318.

In other words, failing to administer the *Miranda*

warnings is not, in and of itself, a constitutional violation capable of "tainting" the subsequent confession and rendering it inadmissible. But police misconduct involving actual coercion could be. *Elstad*, therefore, should be read as a broad rejection of the "fruits" doctrine in the *Miranda* context, because when there is no underlying violation of a constitutional right, there is no "poisonous tree." *See id.* at 308 (equating the situation where the alleged "fruit" is the accused's own subsequent, voluntary testimony with situations where the fruit is a witness or an article of evidence).

But even if *Elstad* is not read to reject the "fruits" doctrine in the Fifth Amendment context, or if *Dickerson* is read to alter this aspect of *Elstad*, the reasoning of *Elstad* demonstrates that a broad exclusionary rule should not apply to bar the admission of a subsequent, fully-warned statement when the initial unwarned statement was otherwise voluntary. A fully-warned confession in the wake of unwarned interrogation is the product of *volition*, willingly offered up by a defendant who is aware of the *Miranda* warnings. "[A] careful and thorough administration of *Miranda* warnings serves to *cure* the condition that rendered the unwarned statement inadmissible." *Elstad*, 470 U.S. at 310-311 (emphasis added). "Once warned, the suspect is free to exercise [her] own volition in deciding whether or not to make a statement to the authorities." *Id.* at 308. This approach is consistent with the Fourth Amendment doctrine, which treats volitional witness testimony as less susceptible to suppression as "fruits of the poisonous tree." *See United States v. Ceccolini*, 435 U.S. 268, 279-280 (1978). In other words, the subsequent administration of *Miranda* warnings is an intervening event that separates the second statement from the first, making it no longer the product or "fruit" of the unwarned interrogation.

B. The voluntary disclosure of a "guilty secret" during unwarned interrogation carries no constitutionally coercive "taint" because it is not the product of official coercion.

The obviously coercive effect of threats or physical abuse is quite unlike the effect of a previous, unwarned admission. An unwarned admission has, at most, a lingering psychological impact. But in *Elstad*, the Court held that any "lingering compulsion" resulting from the initial unwarned statement lacked constitutional implications. *Oregon v. Elstad*, 470 U.S. at 311-312.

The Oregon Supreme Court had reached a contrary conclusion. That court said that by answering the first question, the defendant must have believed that "he ha[d] let the cat out of the bag and, in so doing, ha[d] sealed his own fate." *Id.* at 310-311. But this Court rejected the proposition that the prior answer had an improperly coercive effect, explaining that the "voluntary disclosure of a guilty secret" does not qualify "as state compulsion," and it does not "compromise[] the voluntariness of a subsequent, informed waiver." *Id.* at 311-312. "[A]bsent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion." *Id.* at 314.

This is not to say that the existence of the previous, unwarned statement can have no effect upon the suspect during subsequent questioning. For, once a statement is made to law enforcement officers, the suspect is "never thereafter free of the psychological and practical disadvantages of having confessed." *Id.* at 311 (quoting *United States v. Bayer*, 331 U.S. 532, 540-541 (1947)). Nevertheless, absent official compulsion, the existence of a prior statement should have no bearing upon the admissibility of a subsequent, fully-warned statement obtained after a valid waiver. Indeed, even if

officers refer to the unwarned admission during subsequent questioning, such references should not generally affect the admissibility of the subsequent statement. Of course, the unwarned admission cannot be exploited to pressure a suspect to waive her Fifth Amendment right to remain silent, *see id.* at 316 (officers did not "exploit the unwarned admission to pressure [the suspect] into waiving"); however, it would exalt form over substance to forbid officers from mentioning a fact that is already out in the open.

C. In deciding whether a subsequent, warned statement is admissible, a court focuses on the "totality of the circumstances" surrounding the warned statement and determines if it was knowingly and voluntarily made.

The admissibility of a warned statement that follows an unwarned statement, as with any other statement, turns "solely on whether it is knowingly and voluntarily made." *Elstad*, 470 U.S. at 309. Therefore, rather than applying a "fruits" analysis – where once a constitutional violation is found the presumption of exclusion carries forward and can only be overcome by proving the "taint" was dissipated – under *Elstad*, the prosecution must only prove that the statement was knowingly and voluntarily made, and the court must evaluate the statement under the totality of the circumstances.

The proper administration of the *Miranda* warnings adequately addresses the "knowingly" requirement. *See id.* at 316 (rejecting the need for an additional or modified warning in cases where there has been an unwarned statement). Consequently, after there has been a valid warning and waiver, the focus must turn to the voluntariness of the statement. *Id.* at 309; *see United States v. Esquilin*, 208 F.3d 315, 320 (1st Cir. 2000) (describing *Elstad*'s focus on the issue of voluntariness). To determine whether the warned statement was voluntary, courts look at the warned interrogation to see if it was coercive, and also look at all of the events surrounding the unwarned statement to determine if there were other circumstances that tended to undermine the "suspect's will to invoke his rights." *Oregon v. Elstad*, 470 U.S. at 309-311, 317.

This Court has never abandoned the due process jurisprudence that initially served as the basis for excluding involuntary statements. *Dickerson v. United States*, 530 U.S. at 434. After this Court's decisions in *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Miranda*, the focus shifted to determining admissibility under the Fifth Amendment. *Dickerson*, 530 U.S. at 434. But the Court still employs the due process "totality of all the surrounding circumstances" voluntariness analysis. *Id.* (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)). The appropriate standard under due process is whether the circumstances as a whole tend to "shock[] the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

The initial decision to withhold warnings can be considered in combination with all other attendant circumstances to determine whether there was a due process violation. While not giving *Miranda* warnings is "a significant factor," standing alone it does not violate due process. *Davis v. North Carolina*, 384 U.S. 737, 740-741 (1966) (failure of police to provide *Miranda* warnings "gives added weight to the other circum-stances" considered to determine if the confession was voluntary). Generally, to exclude a confession, the totality of the circumstances must demonstrate that the defendant's will was overborne. *Dickerson v. United States*, 530 U.S. at 433-434.

In sum, even if this Court were inclined to revisit its precedent and adopt a broader *Miranda* exclusionary rule that bars the admission of not only the unwarned

statement but also derivative evidence, such a rule would not bar admission of a subsequent, warned statement. A subsequent, warned statement is not derivative of the initial unwarned statement; rather, it is the product of a separate volitional act. The general rule of *Elstad* – "that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings" – should not be overruled, and the admission of warned statements should continue to turn solely upon whether such statements are knowing and voluntary under the totality of the circumstances.

III. INTENTIONALLY WITHHOLDING THE *MIRANDA* WARNINGS BEFORE QUESTIONING DOES NOT VIOLATE THE CONSTITUTION AND NEED NOT BE DETERRED ANY MORE THAN IT ALREADY IS BY THE EXCLUSION OF THE UNWARNED STATEMENT ITSELF FROM THE PROSECUTION'S CASE IN CHIEF.

The Missouri Supreme Court distinguished this case from *Elstad* by pointing out that the questioning officer here "purposely withheld" the *Miranda* warnings before the first stage of the interrogation. (Pet. App. A7). And it was to this "intentional" withholding of the *Miranda* warnings – as opposed to the allegedly "inadvertent" withholding in *Elstad* – that the Missouri Court attached a presumption of coercion that carried forward even after adequate warnings were given. (Pet. App. A9-A13). In so doing, the Missouri Court did not find that the initial statement was involuntary; rather, it focused on the intentional nature of the decision not to warn.

A. Questioning before giving *Miranda* warnings does not warrant a presumption of compulsion as to the subsequent, fully-warned statement because it is not conduct that undermines the suspect's free will.

In *Elstad*, the Court analyzed the coercive effect of an unwarned statement by determining whether that statement was, aside from the *Miranda*-based presumption of compulsion, voluntary. *Oregon v. Elstad*, 470 U.S. at 318. This was logical because absent a determination that the first, unwarned statement was actually involuntary, there was no basis to find that it could have affected the voluntariness of a statement made after adequate warnings. Yet, in respondent's case, the Missouri Court never found that respondent's initial statement was actually involuntary. Instead, the court concluded that an initial, unwarned statement, whether voluntary or involuntary, can render a subsequent statement involuntary based on the officer's subjective intent in withholding the *Miranda* warnings (Pet. App. A7-A9).

In an attempt to reconcile its holding with *Elstad*, the Missouri Court appears to have found that the decision not to provide the initial *Miranda* warning was an improper tactic as that phrase is used in a passage from *Elstad*: "[A]bsent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion" as to the subsequent statement. 470 U.S. at 314. But the Missouri Court misunderstood the meaning of "improper tactics." Although the Court in *Elstad* did not define the phrase, its meaning is reflected in the emphasis on voluntariness throughout the *Elstad* opinion. As the First Circuit noted in *United States v. Esquilin*, 208 F.3d at 320, in *Elstad* the Court used several additional detailed phrases that are synonymous with the term "improper tactics" and reflect the Court's focus on

official misconduct during the initial unwarned statement that tends to undermine the suspect's free will. These phrases included: "actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will," 470 U.S. at 309; "physical violence or other deliberate means calculated to break the suspect's will," *id.* at 312; and "inherently coercive police tactics or methods offensive to due process that render the initial admission involuntary and undermine the suspect's will to invoke his rights once they are read to him." *Id.* at 317.

If *Elstad* is read "as a coherent whole, it follows that 'deliberately coercive or improper tactics' are not two distinct categories . . . but simply alternative descriptions of the type of police conduct that may render a suspect's initial, unwarned statement involuntary." *United States v. Esquilin*, 208 F.3d at 320. *See also United States v. Orso*, 266 F.3d at 1035-1037 (rejecting a reading of the "improper tactics" language in *Elstad* as creating a wholly separate category of official misconduct). *But see United States v. Carter*, 884 F.2d 368, 372-374 (8th Cir. 1984) (suppressing, in dicta, a second, warned statement based on a finding of improper tactics – the so-called "end run around *Miranda*" – where the questioning officers did not give the required *Miranda* warnings until after they had obtained a confession).

The Missouri Court believed that the officer's conduct in this case was an improper tactic (Pet. App. A12), but its reasoning departed fundamentally from the rationale of *Elstad* in at least two ways. First, focusing almost entirely on the officer's subjective intent and seizing on the "circumstances calculated to undermine the suspect's ability to exercise his free will" language in *Elstad*, the Missouri Court presumed that the officer's purpose in initially questioning respondent without giving *Miranda* warnings was to "weaken [her] ability to

knowingly and voluntarily exercise her constitutional rights" (Pet. App. A9).[6] Second, because there was no dissipation of the "taint" from the officer's alleged misconduct, the Court concluded that the officer's conduct must have coerced respondent's confession (Pet. App. A12).

In defining the effect of the first statement on the second, the Missouri Court, like the Oregon court in *Elstad*, focused on a "subtle form of lingering compulsion" resulting from the prior admission. *See Elstad*, 470 U.S. at 311. The Missouri Court found it critical that the first statement was a "breakthrough," stating that the questioning officer "wanted to secure a 'breakthrough' admission before warning Seibert of her rights because he feared that she would assert those rights were she made aware of them" (Pet. App. A9). Thus, the Missouri Court adopted a view very similar to the Oregon court's "cat out of the bag" rationale. According to the Missouri Court, the unwarned statement "tainted" the subsequent, warned statement because once the respondent had made an admission, she was more likely to make the admission again or to make other admissions.

But this Court expressly rejected the "cat out of the bag" rationale as a basis for finding the second statement involuntary. *Elstad*, 470 U.S. at 311. Such claims rely upon the effect of the previous *admission* upon subsequent interrogation, *see id.* at 309-311; however, the Court observed that the Fifth Amendment is not "concerned with moral and psychological pressures to

---

[6] As the dissent pointed out, the record does not support this presumption (Pet. App. A17). While the officer acknowledged that his "hope" and "intent" were to gain an admission (J.A. 31), he did not indicate that this was designed to overcome respondent's will, or that he believed by obtaining an initial admission she would be more likely to make a statement once advised of the *Miranda* warnings.

confess emanating from sources other than official coercion." *Id.* at 304-305. The Court expressed concern that "endowing the psychological effects of *voluntary* unwarned admissions with constitutional implications would, practically speaking, disable the police from obtaining the suspect's informed cooperation even when the official coercion proscribed by the Fifth Amendment played no part in either his warned or unwarned confessions." *Id.* at 311 (emphasis in original).

After carrying the presumption of coercion forward to the warned statement, the Missouri Court applied the attenuation doctrine from the Fourth Amendment's "fruits" analysis (Pet. App. A9-A11). The attenuation doctrine recognizes that the connections between an initial constitutional violation and the evidence sought to be excluded may become so attenuated as to dissipate the taint and allow admission. *See Wong Sun v. United States*, 371 U.S. at 487-488. Because the attenuation factors the Missouri Court considered (*e.g.*, passage of time between questioning and change in questioning officer or location) were not present in respondent's case, the Missouri Court found that the respondent was "subjected to a nearly continuous period of interrogation" and thus that her second statement was involuntary (Pet. App. A9-A11).

But in even addressing attenuation, the Missouri Court again disregarded *Elstad*. In *Elstad* this Court found the attenuation factors to be relevant only when the prior statement was actually coerced. *Oregon v. Elstad*, 470 U.S. at 310. This is a logical recognition of the difference between actual and presumptive coercion. A change in officer or location or the passage of time may be required to restore the suspect's ability to exercise free will when, for example, she has been terrorized, beaten or deprived of sleep or food. But the same is not true when the only "taint" that allegedly exists is the lingering psychological impact of the fact

that the suspect has revealed a guilty secret.

In *Elstad*, the Court recognized the impact of having revealed a guilty secret, noting that once a suspect has let the cat out of the bag,

> [she] is never thereafter free of the psychological and practical disadvantages of having confessed. [She] can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession may always be looked upon as fruit of the first.

Id. at 311 (quoting *United States v. Bayer*, 331 U.S. at 540-541) (internal quotation mark omitted). But the Court also recognized that if the "cat out of the bag" theory were a basis for finding an ongoing taint, that taint could not be dissipated by time, or change of place or questioner, and that giving that taint dispositive effect was both impractical and unjustified. *Id.* at 310-312. A suspect who makes a voluntary admission knows the police know the truth, but that knowledge is not the product of coercion, and it does not hamper free will.

The Missouri Court's "breakthrough" analysis would make it virtually inevitable that once a suspect makes an unwarned statement, she would be immunized from making an admissible confession. That result exacts too high a cost from legitimate law enforcement. *Oregon v. Elstad*, 470 U.S. at 312.

B. Focusing on the subjective intent of the officer ignores the relevant inquiry of the Fifth Amendment, improperly seeks to govern police conduct, and leads to disparate treatment of defendants.

For the Missouri Court, what distinguished this case from *Elstad* was the intent of the officer during the initial interrogation (Pet. App. A7). But under *Elstad*, the critical issue surrounding the initial statement is whether it was voluntarily made: "there is no warrant

for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary." 470 U.S. at 318. The question here, then, is whether the fact that the officer acted intentionally is sufficient to render the initial statement involuntary. The answer is clearly no.

In determining whether a Fifth Amendment violation has occurred, this Court has focused on the objective circumstances of an interrogation, rather than the subjective intent of the questioning officer, because the officer's unarticulated intent can have no effect on the individual. An objective rule serves the purpose of the Fifth Amendment: to bar the use of *compelled* testimony.

This Court's preference for an objective test in the Fifth Amendment context is shown by its repeated refusal to apply subjective tests. *See Stansbury v. California*, 511 U.S. 318, 323-325 (1994) (an officer's undisclosed, subjective beliefs have no bearing upon *Miranda*'s objective in-custody determination); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (for purposes of *Miranda*, "[a] policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."); *Rhode Island v. Innis*, 446 U.S. 291, 300-302 (1980) ("the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response," regardless of the "underlying intent of the police"); *Beckwith v. United States*, 425 U.S. 341, 346-347 (1976) (that a suspect is the "focus" of a law enforcement investigation when questioned does not, in itself, transform questioning into custodial interrogation).

Even in the Fourth Amendment context, this Court

has stated that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren v. United States*, 517 U.S. 806, 813 (1996) ("'the fact that [an] officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.'") (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)). *See also United States v. Mendenhall*, 446 U.S. 544, 554 n.6 (1980) (opinion of Stewart, J.) (the officer's subjective intent to detain is not determinative of whether a seizure occurred within the meaning of the Fourth Amendment); *United States v. Robinson*, 414 U.S. 218, 236 n. 7 (1973) (the officer's subjective fear is not determinative of necessity for search-incident-to-arrest exception to the Fourth Amendment warrant requirement).

Similarly, in crafting the "public safety" exception to the requirement that *Miranda* warnings precede a suspect's admissible answers, this Court stated that "the availability of that exception does not depend upon the motivation of the individual officers involved." *New York v. Quarles*, 467 U.S. at 655-656. This Court struck a balance between the doctrinal underpinnings of *Miranda* – the need to protect the core guarantee of the Fifth Amendment – and the need for reasonable law enforcement, stating:

> Whatever the motivation of individual officers in such a situation, we do not believe that the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety.

Id. at 656.

In the Fifth Amendment context, in particular, the focus must be on the individual and whether the circumstances in question tended to have the effect of

compelling a statement. This focus is evident in *Moran v. Burbine*, 475 U.S. at 415-416, where the defendant claimed that law enforcement officers had violated *Miranda* and "tainted" his waiver by interfering with his attorney's ability to communicate with him during custodial interrogation. The defendant in that case was advised of the *Miranda* warnings; however, he was not told that an attorney had offered to represent him (or told about efforts to obtain an attorney for him), and the attorney was prevented from communicating with him. *Id.* at 416-417. Despite this lack of information, but in the absence of any coercive conduct applied to the defendant, this Court concluded that the waiver was valid. *Id.* at 421. Additionally, absent coercive police conduct, this Court observed that "[e]vents occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right." *Id.* at 422-423.

Furthermore, as this Court observed in *Moran*, "whether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights." *Id.* at 423. Indeed, it could be said, as this Court observed in *Moran*, that while a "deliberate" decision to withhold *Miranda* warnings may be "objectionable as a matter of ethics, such conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." *Id.* at 423-424.

This Court has refused to treat similarly situated individuals differently based on the subjective intent of the police officer. Rejecting such a result in *Moran*, this Court stated:

> [T]he same defendant, armed with the same information and confronted with precisely the same police conduct, would have knowingly waived his *Miranda* rights had a lawyer not telephoned the police station to inquire about his status. Nothing in any of our waiver decisions or in our understanding of the essential components of a valid waiver requires so incongruous a result.

475 U.S. at 422. The Missouri Court would do what this Court refused to do in *Moran*: treat defendants "armed with the same information and confronted with precisely the same police conduct" in opposite ways, based on an intent that the defendant did not and could not surmise. This inconsistency is not supported by either the language or the purpose of the Fifth Amendment.

Avoiding the introduction of a subjective-intent element also has the benefit of maintaining the present, relative ease of applying the rules established by *Miranda* and its progeny, particularly *Oregon v. Elstad*. Officers, litigants, and courts know that if the officer does not administer the *Miranda* warnings prior to custodial interrogation, any statements obtained during that interrogation are inadmissible in the prosecution's case in chief (with only a few exceptions). And *Elstad* informs officers and courts how to determine whether a subsequent, warned confession is admissible. That determination does not require inquiry into the mental state of the questioning officer. Rather, courts examine the objective circumstances of the interrogation. One of the primary purposes of the *Miranda* decision was to create a bright-line test for admissibility of in-custody interrogations. *Elstad* 470 U.S. at 306-307 n. 1. Adopting the Missouri Court's approach would unnecessarily complicate the bright-line rule by forcing courts to determine the officer's subjective intent in each case where the initial warnings were not given.

In short, the purpose of *Miranda* "is not to mold police conduct for its own sake," because "[n]othing in the Constitution vests in [this Court] the authority to

mandate a code of behavior for state officials wholly unconnected to any federal right or privilege." *Moran v. Burbine*, 475 U.S. at 425. Rather, the purpose of *Miranda* is to secure the Fifth Amendment privilege against *compelled* self-incrimination. Thus, the appropriate focus of judicial inquiry is on the objective circumstances and their effect on the individual. The courts should not, as the Missouri Court did, turn Fifth Amendment analysis on its head, focus upon the subjective intent of the officer, and, based on the officer's presumed purpose, conclude that an otherwise voluntary statement is involuntary. If a law enforcement practice – whether purposeful or accidental – does not actually violate the Fifth Amendment, or jeopardize the core guarantee of the Fifth Amendment, it should not be curtailed or deterred with additional codes laid down by this Court citing the Fifth Amendment as authority.

C. The deterrence rationale of the Fourth Amendment exclusionary rule should not be imported into the Fifth Amendment to create a broader *Miranda* exclusionary rule.

The foundation for the Missouri Court's broadening of *Miranda*'s exclusionary rule was the deterrence rationale of the Fourth Amendment's "fruits" doctrine. The Missouri Court not only imported a broad "fruits" exclusionary rule into the Fifth Amendment context, but also gave the deterrence rationale a pivotal role, stating: "An intentional violation of *Miranda* shifts the focus from the goal of gaining trustworthy evidence – though that is still a major concern – to the goal of deterring improper police conduct" (Pet. App. A7). If the primary purpose of *Miranda* were to deter unwarned interrogation altogether, then this extension of *Miranda*'s exclusionary rule might make sense. But that is not the primary purpose of *Miranda*.

In the Fourth Amendment context, the broader

exclusionary rule serves the primary purpose of deterring improper police conduct – *i.e.*, future violations of the Fourth Amendment. But to warrant the broadening of *Miranda*'s exclusionary rule under the Fifth Amendment, there must be a compelling need to both deter improper police conduct and to assure trustworthy evidence. *Oregon v. Elstad*, 470 U.S. at 308. However, as discussed above, when the alleged official "misconduct" was the mere failure to give *Miranda* warnings, this Court has already declined to extend the deterrence rationale into the Fifth Amendment context. *Id.* at 308-309. And, although the Court has considered whether the need to deter allegedly improper conduct justifies a broader *Miranda* exclusionary rule in other circumstances, in each case the Court has concluded it does not. *See Harris*, 401 U.S. at 225; *Hass*, 420 U.S. at 723; and *Tucker*, 417 U.S. at 447.

The Court's refusal to import the Fourth Amendmended's "fruit of the poisonous tree" doctrine into the Fifth Amendment context is explained by the Court's recognition that "unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment." *Dickerson*, 530 U.S. at 441. Fourth Amendment rights are substantive in nature. A violation of the Fourth Amendment search and seizure provision is completed when the officer performs an unreasonable search or seizure. No further official misconduct is needed to support the finding of a constitutional violation. Thus, the broad "fruits" exclusionary rule is employed not to avoid or cure the already-completed constitutional violation, but to deter future violations.

By contrast, the Fifth Amendment privilege is a procedural right. The constitutional violation occurs when compelled testimony is used against a defendant to prove the prosecution's case, not when she is compelled to speak. Thus, *Miranda* requires only the exclusion

of an unwarned statement from the prosecution's case at trial. Read properly, the Fifth Amendment regulates the admission of statements at trial, not the out-of-court conduct of the police. *See Chavez v. Martinez*, 123 S.Ct. at 2001-2003 (plurality opinion). In short, police officers do not commit misconduct by merely engaging in unwarned questioning. Consequently, absent actual coercion, there is no need to deter such conduct by broadening the *Miranda* exclusionary rule.

Even if the Fifth Amendment addressed police conduct so as to justify a limited deterrence rationale, barring only the use of the unwarned statement itself in the prosecutor's case in chief would be a sufficient remedy. In *Elstad*, this Court concluded: "[The dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case by barring use of the unwarned statement in the case in chief." 470 U.S. at 318; *see also Chavez v. Martinez*, 123 S.Ct. at 2013 ("The identification of a *Miranda* violation and its consequences . . . ought to be determined at trial. The exclusion of unwarned statements, when not within an exception [to *Miranda*], is a complete and sufficient remedy.") (Kennedy, J., concurring in part and dissenting in part); *New York v. Quarles*, 467 U.S. at 669 ("The harm caused by failure to administer *Miranda* warnings relates only to admission of testimonial self-incriminating, and the suppression of such incriminating should by itself produce the optimal enforcement of the *Miranda* rule.") (O'Connor, J., concurring in part and dissenting in part); *Harris v. New York*, 401 U.S. at 225 (holding that "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.").

Thus, under *Elstad*, there is already adequate, though limited, deterrence to engaging in unwarned interrogation. The officer in this case recognized that, by

utilizing the two-stage interrogation as he was trained to do,[7] he was "rolling the dice" (J.A. 35). He knew that if the respondent made an initial statement, but after being advised of her rights refused to waive and make a second statement, he would have no admissible statement. Such knowledge will not always deter an officer from engaging in unwarned interrogation, because gaining admissible evidence is not the only valid purpose of interrogation. But it does have some deterrent effect, for when an officer chooses to proceed without the warnings, the exclusion of any unwarned statement is certain. Thus, officers will give the warnines in most instances, or, consistent with the core guarantee of the Fifth Amendment, tread very carefully during unwarned interrogation, so that any subsequent, warned statement will be admissible at trial as truly voluntary.

Excluding only the unwarned statement itself is an adequate constitutional remedy for an officer's failing to give *Miranda* warnings. *Oregon v. Elstad*, 470 U.S. at 318 ("the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case by barring use of the unwarned statement in the case in chief."). It also strikes an appropriate balance

---

[7] In the petition for certiorari, petitioner stated that the officer "may" have been referring to the Reid Institute when he said he had been trained at a "national" institute (Pet. at 17 n.8). Petitioner has since been informed that the Reid Institute does not train officers to intentionally withhold warnings prior to custodial interrogation. The Reid training materials discuss advantages of "conducting a nonaccusatory interview before an interrogation[,]" but officers are told that "[t]he only time a police interrogation may be conducted of a suspect who is in custody . . . is after he has received the required warnings[.]" FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 5-10, 218, 491 (4th ed. 2001). The materials describe *Oregon v. Elstad* as merely providing "corrective measures that may be employed to salvage an interrogation opportunity." *Id.* at 516.

between the Fifth Amendment purpose of protecting the individual from compulsion and the needs of law enforcement. This balance recognizes that unwarned questioning is not *per se* misconduct, and that unwarned questioning may serve legitimate law enforcemended purposes beyond the discovery of admissible evidence, including: ensuring public safety; locating accomplices or developing evidence against them; finding and removing from circulation dangerous weapons, drugs or other contraband; locating a crime victim; or focusing an investigation when there are multiple suspects.

This case involved such concerns. Although the questioning officer hoped to obtain information, he knew that no statement made before he administered the warnings and obtained a waiver would be admissible to prove the state's case (J.A. 31, 35-36). But even inadmissible evidence would help the investigation. Although respondent was already a suspect, there were multiple suspects involved. The trailer where the victim died was occupied by the respondent, her five sons, and the victim (Tr. 854-855). Five people were present at the first meeting to plan the fire, including respondent, two of her sons, and two of their friends (J.A. 68; State's Exhibit 42; Tr. 838, 858). Ultimately, two of the boys who had been present at the planning meeting participated in setting the fire (Tr. 633-634, 867-872, 903-904). The interrogation of respondent took place relatively early in the investigation – just five days after the murder (J.A. 17). The officers had interviewed Derrick Roper, and he had provided them with information (J.A. 46). It was reasonable for the officers to act immediately upon that information, arrest the respondent, and attempt to get information to both sort out the roles of the various conspirators and focus the investigation.

Obtaining information, even if inadmissible, was important not just to ascertain the facts, but to

appropriately exercise prosecutorial discretion in arrests, charges, promises of immunity, and plea agreements. One of the conspirators, a juvenile, was persuaded by his mother to participate in the murder as a means of helping her cover up the death of his brother (Tr. 857, 859-860, 903-904). Knowing the level of the mother's involvement and the pressure she brought to bear on her son might ultimately influence charging or plea decisions. In fact, the state entered into a plea agreemended with the son (Tr. 877-878, 903).

Again, here, the officer had legitimate reasons to seek information early in the investigation, even if the information would not ultimately be admissible. He did not engage in any objectively coercive conduct, and prior to seeking the confession that was actually used at trial, he carefully advised the respondent of the *Miranda* warnings and obtained a waiver without exerting pressure upon her. And even if respondent had not waived the privilege, the officer gained information that had value to the prosecution regardless of its admissibility.

Miranda was never designed to prohibit such an inquiry; rather, it provides safeguards in the custodial setting that are intended to ensure a valid waiver of the Fifth Amendment privilege. Thus, once *Miranda*'s safeguards are put in place, there is no reason to exceed *Miranda*'s holding; the traditional methods of deterring actual official misconduct are sufficient.

In sum, whether officers intentionally withhold *Miranda* warnings or inadvertently fail to give them, the effect upon the suspect is the same. A subjective intent is irrelevant in determining whether the suspect's eventual waiver is valid. Thus, so long as police conduct stays within the constitutional bounds laid down by *Miranda* and its progeny, such conduct should be allowed to protect "society's compelling interest in finding,

convicting, and punishing those who violate the law." *Moran v. Burbine*, 475 U.S. at 426.

IV. RESPONDENT'S SUBSEQUENT, WARNED STATEMENT WAS VOLUNTARY AND WAS PROPERLY ADMITTED UNDER THE RATIONALE OF *OREGON V. ELSTAD*.

To determine the admissibility of respondent's second, warned statement, *Elstad* requires the resolution of two questions: first, did the police engage in any actually coercive conduct during the first, unwarned interrogation; and second, was the subsequent, warned statement knowingly and voluntarily made. If there was no actually coercive police conduct during the first interrogation, then there is no "taint" from the decision to withhold *Miranda* warnings, and the second statement is admissible if it was knowing and voluntary. If there was actually coercive police conduct during the first, unwarned interrogation, then *Elstad* requires that the "taint" from the coercive questioning dissipate before police can obtain a subsequent, usable statement.

In Missouri, when reviewing a trial court's ruling on a motion to suppress, there must be "substantial evidence" to support the ruling. *State v. Rousan*, 961 S.W.2d 831, 845 (Mo. banc), *cert. denied*, 524 U.S. 961 (1998). The evidence is viewed in the light most favorable to the trial court's ruling. *Rousan*, 961 S.W.2d at 845. "Deference is given to the trial court's superior opportunity to determine the credibility of witnesses." *Id.* Under this standard, respondent's warned statement passed the *Elstad* test, and the decision to admit the warned statement should have been upheld.

A. The officers did not engage in actually coercive conduct during the unwarned interrogation.

Traditional indicia of coercion revolve around the duration and conditions of the detention, the manifest attitude of the police toward the suspect, the suspect's physical and mental state, and the "'diverse pressures which sap or sustain [the suspect's] powers of resistance and self-control.'" *See Colorado v. Spring*, 479 U.S. 564, 574 (1987) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961) (opinion of Frankfurter, J.)). Here, the duration of the first interrogation was very brief – about thirty minutes – and such a short period of time, in the absence of any physical duress or threats, did not overbear respondent's will. *See State v. Rousan*, 961 S.W.2d at 846 (two interrogations lasting a total of about three and one half hours, over a six-hour period, were not coercive); *see also Stein v. New York*, 346 U.S. 156, 185 (1953), *overruled in part by Jackson v. Denno*, 378 U.S. 368 (1964) (twelve hours of intermittent questioning by successive officers, over a thirty-two hour period, with the suspects sleeping and eating in the interim, was not "so oppressive as to overwhelm powers of resistance."); *compare Ashcroft v. Tennessee*, 322 U.S. 143, 153-154 (1944) (thirty-six hours of questioning by successive officers, with no respite for the defendant, compelled any confession that was made).

Likewise, the conditions of the interrogation – a small interview room at the police station – were not so coercive as to overcome respondent's will. The presumptive coercion that attaches to custodial interrogation is not the equivalent of actually coercive police conduct, *see Oregon v. Elstad*, 470 U.S. at 317 ("When police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled . . . ."), and there was no evidence that respondent felt afraid or

oppressed at the police station.

Additionally, the attitude and actions of the questioning officers were not coercive. Questions were asked in low, conversational tones, and there were no threats or promises made to induce respondent's confession (J.A. 21-22). At some point, the questioning officer gently squeezed respondent's arm (J.A. 59). The Missouri Supreme Court appears to have interpreted this act as intended to put pressure on respondent (Pet. App. A10), but the officer's action was precipitated by respondent's outward display of grief (J.A. 59). Thus, such action was far more consistent with comforting respondent while she dealt with difficult events.

The interrogation did take place in the early morning hours, but there was no evidence that respondent was exhausted, groggy, sleepy, or otherwise incapable of answering the officer's questions. Respondent was an adult woman, she had been sleeping prior to the arrest, and there was no reason to believe that she could not wake up and, after the passage of about forty-five minutes, make voluntary statements. *See Watson v. Detella*, 122 F.3d 450, 452, 456 (7th Cir. 1997) (although defendant had not slept or eaten during the four hours he was in custody from about 4:30 a.m. until he gave his second, fully warned written confession, there was "no evidence that his free will was overcome by either exhaustion or hunger."). Admittedly, the respondent was also suffering emotionally, but those emotions were a natural response to the untimely death of her young son, the injuries her other son had received in carrying out the murder she had orchestrated, and her consciousness of guilt. There was no evidence that she was given the "third degree" and that, as a consequence, she broke down and became emotional. *See Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (evidence of the defendant's mental condition alone, absent evidence of police coercion is insufficient to demonstrate

that a confession is involuntary); *Oregon v. Elstad*, 470 U.S. at 304-305 (the Fifth Amendment is not "concerned with moral and psychological pressures to confess emanating from sources other than official coercion.").

In short, consistent with the demands of *Elstad*, there was no evidence that the police engaged in actually coercive conduct during the first interview. To the contrary, the police engaged in a brief interrogation that "had none of the earmarks of coercion." *See id.* at 316. The answer to the first *Elstad* question, then, is that the initial, unwarned statement was not actually coerced.

B. Respondent's second, warned statement was knowingly and voluntarily made.

After the first, unwarned interrogation, and after a fifteen- to twenty-minute break (wherein respondent was given a cup of coffee and allowed to smoke a cigarette), the officers carefully administered the *Miranda* warnings, and respondent executed the waiver without being pressured in any way. Thereafter, her second, warned statement was "knowingly and voluntarily made." *Oregon v. Elstad*, 470 U.S. at 309.

The second interrogation, as with the first, was not coercive. The interrogation continued in the same room, the officer's tone was low and conversational, there were no threats, and the questioning lasted only eighteen minutes (J.A. 21-22, 65, 73; State's Exhibit 42). Admittedly, respondent was not affirmatively informed that her previous statement could not be used to prove her guilt. But, as this Court stated in *Elstad*, "[s]uch a requiremended is neither practicable nor constitutionally necessary." 479 U.S. at 316. This is because the *Miranda* warnings "convey[] the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an 'act of free will.'" *Id.* at 311 (quoting *Wong Sun v. United*

States, 371 U.S. at 486). Moreover, "[t]his Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness." *Id.* at 316; *Moran v. Burbine*, 475 U.S. at 422 ("[w]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.").

The officer did make a few references to the first interrogation, but at no time was the unwarned interrogation used to pressure the respondent into waiving her right to remain silent. The officer began by acknowledging that they had "been talking for a little while about what happened on" the day of the murder (J.A. 66; State's Exhibit 42). Toward the conclusion of the interrogation, the officer again mentioned their previous discussion and asked, "didn't you tell me that [the victim] was supposed to die in his sleep?" (J.A. 70; State's Exhibit 42). Those references did not render respondent's second statement involuntary. The officer did not, for example, coax respondent into signing the waiver by suggesting that her previous, unwarned statemended made resistence futile. He did not suggest that she might as well repeat her previous statement because they already had enough to convict her. Had there been any such coaxing, then the officer's conduct would have violated the rule of *Elstad*, which would not countenance an officer's "exploit[ing] the unwarned admission to pressure respondent into *waiving* [her] right to remain silent." 470 U.S. at 316 (emphasis added). Under such circumstances, a waiver and subsequent statement might very well have been compelled.

In any event, the officer did not misuse the unwarned statement to pressure a waiver; rather, the officer merely referred to the "guilty secret" that respondent knew she had already revealed to the police. That small reminder of what she had already voluntarily

divulged did not render her subsequent statement involuntary. *See id.* at 311-312 (declining to allow the psychological effect of a voluntarily-disclosed "guilty secret" to "disable the police from obtaining the suspect's informed cooperation"). Accordingly, having considered the totality of the circumstances the trial court properly concluded that respondent's will was not overborne and that her second warned confession was knowingly and voluntarily made.

CONCLUSION

The judgment of the Supreme Court of Missouri should be reversed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

KAREN K. MITCHELL
Chief Deputy Attorney General
Counsel of Record
JAMES R. LAYTON
State Solicitor
SHAUN J MACKELPRANG
KAREN P. HESS
Assistant Attorneys General
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-0774

Counsel for Petitioner

(6)

No. 02-1371

Supreme Court, U.S.
FILED
OCT 8 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

STATE OF MISSOURI,

Petitioner,

v.

PATRICE SEIBERT,

Respondent.

On Writ Of Certiorari
To The Missouri Supreme Court

BRIEF FOR RESPONDENT

AMY M. BARTHOLOW
Assistant Public Defender
3402 Buttonwood Drive
Columbia, MO 65201
(573) 882-9855

Counsel of Record

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

59 pp

QUESTION PRESENTED

Should the rule of *Miranda v. Arizona*, which constitutionally *requires* the giving of warnings at the outset of a custodial interrogation as a "fully effective means" of protecting the Fifth Amendment privilege, be abrogated, in favor of making the warnings optional, to be administered solely at the discretion of law enforcement?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. THIS COURT SHOULD EXCLUDE ALL EVIDENCE ACQUIRED THROUGH HANRAHAN'S WILLFUL AND UNREASONABLE REFUSAL TO WARN 8

A. Warnings are "constitutionally required," not simply discretionary tools for law enforcement 10

B. *Miranda* warnings cannot serve their protective purpose unless they are given "at the outset" of questioning 15

C. If this Court permits the use of evidence obtained in deliberate violation of *Miranda*, officers nationwide will be trained to do the "Missouri two-step" 19

D. This Court should exclude all evidence obtained through deliberate or objectively unreasonable violations of *Miranda* 24

1) This Court has applied the derivative evidence doctrine even to nonconstitutional violations 26

2) A test focused on objective circumstances is appropriate, but evidence of subjective intent, when available, remains a relevant factor 28

TABLE OF CONTENTS – Continued

Page

E. Petitioner's proposed bad-faith exception to *Miranda* represents an extravagant extension of *Oregon v. Elstad* 33

1) "Improper tactics" in obtaining a statement is distinct from "actual coercion," and constitutes one factor in the totality of the circumstances test 35

2) The Missouri two-step is premised on police officers extracting the "cat out of the bag" 40

F. The Missouri two-step is not necessary to address public safety concerns 42

II. SEIBERT'S WAIVER, COMING IN THE MIDDLE OF THE INTERROGATION, WAS NOT VOLUNTARY, KNOWING OR INTELLIGENT, AND RENDERED THE SUBSEQUENT STATEMENT INVOLUNTARY 44

CONCLUSION 49

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Fulminante, 499 U.S. 279 (1991) 38, 43
Arizona v. Roberson, 486 U.S. 675 (1988) 12
Atwater v. City of Lago Vista, 532 U.S. 318 (2001) 19, 32
Berkemer v. McCarty, 468 U.S. 420 (1984).....11, 39
Blackburn v. Alabama, 361 U.S. 199 (1960) 38
Boyd v. United States, 116 U.S. 616 (1886)..... 8
Brown v. Illinois, 422 U.S. 590 (1975).....34, 35
Bruton v. United States, 391 U.S. 123 (1968).....43
California v. Beheler, 463 U.S. 1121 (1983).....41
Chavez v. Martinez, 123 S.Ct. 1994 (2003) ..13, 14, 15, 38, 49
Colorado v. Connelly, 479 U.S. 157 (1986).....15, 44
Com. v. Chacko, 459 A.2d 311 (Pa. 1983) 48
Com. v. White, 232 N.E.2d 335 (Mass. 1967).....48
Connecticut v. Barrett, 479 U.S. 523 (1987) 11, 46
Darwin v. Connecticut, 391 U.S. 346 (1968).....41
Davis v. North Carolina, 384 U.S. 737 (1966).....18
Davis v. United States, 512 U.S. 452 (1994) 11, 12
Dickerson v. United States, 530 U.S. 428 (2000).....*passim*
Doyle v. Ohio, 426 U.S. 610 (1976) 45
Duckworth v. Eagan, 492 U.S. 195 (1989).....11
Edmond v. Goldsmith, 183 F.3d 659 (7th Cir. 1999).....32
Edwards v. Arizona, 451 U.S. 477 (1980).....12
Elkins v. United States, 364 U.S. 206 (1960) 25

TABLE OF AUTHORITIES – Continued

Page

Escobedo v. Illinois, 378 U.S. 478 (1964).....19, 25
Fare v. Michael C., 439 U.S. 1310 (1978) 15
Fare v. Michael C., 442 U.S. 707 (1979) 12, 47
Fried v. State, 402 A.2d 101 (Md.App. 1979).....48
Haley v. Ohio, 332 U.S. 596 (1948).....17
Harris v. New York, 401 U.S. 222 (1971).....9, 23, 24
Harrison v. United States, 392 U.S. 219 (1968) 26, 27, 42
Haynes v. Washington, 373 U.S. 503 (1963) (Cal.App. 1995).....10, 38
In re Gilbert E., 38 Rptr.2d 866 (Cal.App. 1995).....20
Indianapolis v. Edmond, 531 U.S. 32 (2000) (1938) 32
Johnson v. Zerbst, 304 U.S. 458 (1938) 46
Mallory v. United States, 354 U.S. 449 (1957) 27
Malloy v. Hogan, 378 U.S. 1 (1964) 38
Maryland v. Wilson, 519 U.S. 408 (1997) 31
Mathis v. United States, 391 U.S. 1 (1968).....16
McKune v. Lile, 536 U.S. 24 (2002).....36
McMann v. Richardson, 397 U.S. 759 (1970).....41, 42
McNabb v. United States, 318 U.S. 332 (1943) 27
McNeil v. Wisconsin, 501 U.S. 171 (1991) 12
Michigan v. Harvey, 494 U.S. 344 (1990).....15, 24
Michigan v. Mosley, 423 U.S. 96 (1975).....16
Michigan v. Tucker, 417 U.S. 433 (1974)..... 9, 11, 24, 25, 29
Miller v. Fenton, 474 U.S. 104 (1985).....36

TABLE OF AUTHORITIES – Continued

Page

Minnick v. Mississippi, 498 U.S. 146 (1990) 12, 46

Miranda v. Arizona, 384 U.S. 436 (1966).....*passim*

Moran v. Burbine, 475 U.S. 412 (1986) .....*passim*

Nardone v. United States, 308 U.S. 338 (1939).....26

New York v. Quarles, 467 U.S. 649 (1984)... 9, 11, 15, 19, 43

North Carolina v. Butler, 441 U.S. 369 (1979).....46, 47

Oregon v. Elstad, 470 U.S. 298 (1985).....*passim*

Oregon v. Hass, 420 U.S. 714 (1975) 8, 23, 24

Oregon v. Mathiason, 429 U.S. 492 (1977).....41

Orozco v. Texas, 394 U.S. 324 (1969).....11, 33

People v. Baker, 269 Cal.Rptr. 475 (Cal.App. 1990).....21

People v. Bey, 27 Cal.Rptr.2d 28 (Cal.App. 1993).....20

People v. Bodner, 75 A.2d 440 (1980).....49

People v. Bradford, 929 P.2d 544 (Cal. 1997) 20

People v. Neal, 72 P.3d 280 (Cal. 2003).....20, 21

People v. Peevy, 953 P.2d 1212 (Cal. 1998) 21

People v. Saiz, 620 P.2d 15 (Colo. 1980).....49

Rawlings v. Kentucky, 448 U.S. 98 (1980).....35

Rhode Island v. Innis, 446 U.S. 291 (1980).....*passim*

Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).....27

Spano v. New York, 360 U.S. 315 (1959) 18

Stansbury v. California, 511 U.S. 318 (1994).....9, 11

State v. Badger, 450 A.2d 336 (Vt. 1982).....48, 49

TABLE OF AUTHORITIES – Continued

Page

State v. Dakota, 217 N.W.2d 748 (Minn. 1974) 48

State v. Derrico, 434 A.2d 356 (Conn. 1980).....48

State v. Holt, 354 So.2d 888 (Fla.App. 1978).....48

State v. Knapp, 666 N.W.2d 881 (Wis. 2003).....20

State v. Raymond, 232 N.W.2d 879 (Minn. 1975).....48

State v. Seibert, 103 S.W.3d 295 (Mo.App. 2003).....4, 33, 34, 47, 48

State v. Sickels, 275 N.W.2d 809 (Minn. 1979).....48

Tanner v. Vincent, 541 F.2d 932 (2nd Cir. 1976).....47

Texas v. Cobb, 532 U.S. 162 (2001).....12, 19

United States v. Allen, 59 M.J. 515 (N.M.Ct.Crim.App. 2003).....41

United States v. Bayer, 331 U.S. 532 (1947).....41

United States v. Knight, 395 F.2d 971 (2nd Cir. 1968).....48

United States v. Leon, 468 U.S. 897 (1984) 20

United States v. Toral, 536 F.2d 893 (9th Cir. 1976) 47

United States v. Williams, 504 U.S. 36 (1992).....44

Westover v. United States, 384 U.S. 436 (1966).....*passim*

Whren v. United States, 517 U.S. 806 (1996) 31, 32

Withrow v. Williams, 507 U.S. 680 (1993).....16, 19, 30

Wong Sun v. United States, 371 U.S. 471 (1963)...26, 27, 28

CONSTITUTIONAL AND STATUTORY AUTHORITY

18 U.S.C. §3501.....13

Constitution of the United States, Amendment IV.....25, 35

TABLE OF AUTHORITIES – Continued

Page

Constitution of the United States, Amendment V ....*passim*

Constitution of the United States, Amendment XIV 38

SCHOLARLY AUTHORITIES

David A. Wollin, *Policing the Police: Should Miranda Violations Bear Fruit?*, 53 Ohio St. L.J. 805 (1992).....24

Elwood Sanders, Jr., *Willful Violations of Miranda: Not a Speculative Possibility But an Established Fact*, 4 Fla. Coastal L.J. 29 (2003).....20

Charles D. Weisselberg, *Saving* Miranda, 84 Cornell L. Rev. 109 (1998).....18, 20

Charles D. Weisselberg, *In the Stationhouse After Dickerson*, 99 Mich. L. Rev. 1121 (2001).....20, 21

OTHER REFERENCES

http://www.ago.state.mo.us/032003fl.pdf (Missouri Attorney General's *Front Line Report*, newsletter for Missouri's Law Enforcement officers).....2, 40

http://www.cacj.org/policy_statements/policy_statement_12.htm (website containing verbatim transcripts of official training materials).....22

http://www.reid.com/legalupdates.html (website for John E. Reid and Associates, police training institute).....11

STATEMENT OF THE CASE

On the morning of February 12, 1997, Patrice Seibert discovered that her 12-year-old son, Jonathan, had died in his sleep (TR 755-758, 836, 845, 858).[1] Cerebral palsy had left Jonathan blind and severely disabled (TR 754, 836, 854). Complications from that disease – perhaps a seizure – likely ended his life (JA 52-53; TR 760, 836).[2] Hysterical with grief, Seibert did not report Jonathan's death (TR 836, 845, 858).

While Seibert was away from her home that night, a fire killed Donald Rector and severely burned one of her older sons, Darian (JA 14-15; TR 734-735, 757, 866-867). Phelps County authorities opined that Seibert had aided or encouraged others to set the fire (LF 48). During two informal interviews with Police Detective Richard Hanrahan Seibert denied any involvement in the fire (JA 15-16, 24-26, 43-45). So, the Phelps County Prosecutor conferred with Hanrahan and instructed him to "make a case" against her (JA 54). On February 17, Hanrahan orchestrated Seibert's arrest on the charge of first degree murder, § 565.020, RSMo 1994 (JA 2, 45-46; LF 32, 48).

This time, Hanrahan arrested Seibert at a time and place that would maximize her grief and anxiety, and he utilized a "two-stage" interrogation technique that would exploit her emotional state (JA 42, 52-53). As the State concedes, he employed this technique deliberately (JA 18, 27-34, 52, 59). He withheld *Miranda* warnings from Seibert at the outset of the custodial interrogation for the

---

[1] The record includes the Joint Appendix (JA), transcript (TR), legal file (LF).

[2] Petitioner implies that Seibert did not feed Jonathan (Pet. Br. 2), ignoring the medical examiner's testimony that malnourishment does not necessarily mean that a person was denied food (TR 761). Indeed, the examination showed that Jonathon had eaten 6-8 hours before his death. *Id.*

express purpose of extracting a statement to be used against her at trial (JA 52-54). As the State describes, Hanrahan administered warnings only after he had obtained a statement from her and "the 'cat [was] out of the bag.'" (Cert. Pet. 4). Then, referencing the unwarned statement, he led Seibert to repeat it (JA 33-34).

After trial, the State acknowledged that Hanrahan "feared if he Mirandized the defendant, she might not volunteer information."[3] "He had been taught that suspects are more likely to confess the second time, even after *Miranda* warnings, once they have implicated themselves." *Id.* "[A]n institute, from which [Hanrahan] received interrogation training, has promoted this type of interrogation 'numerous times' and [his] current [police] department, as well as those he was with previously, all subscribe to this training." (Cert. Pet. A-4, JA 31-32).

At the time of her arrest Seibert was with her son, Darian, in a burn center in St. Louis, approximately 100 miles from her home (JA 42, 52). Darian was near death (JA 53). Jonathan's funeral was scheduled for the next day (JA 57). Hanrahan and two other officers, Fire Marshall Rodger Windle and St. Louis Officer Kevin Clinton, awakened Seibert at 3:00 a.m. (JA 45-46, 51-52). Hanrahan realized that Seibert was grief-stricken; she was crying and upset during the interrogation (JA 53). Later, Hanrahan placed her on suicide watch (JA 23, 61-62).

Hanrahan arranged for Clinton to make the arrest, instructing him to withhold from Seibert her constitutionally-required *Miranda* warnings (JA 26-28, 51-52). Hanrahan withheld the warnings from Seibert because he

[3] *See* Missouri Attorney General's *Front Line Report*, a newsletter for Missouri's law enforcement officers. It reports that this training was "faulty," and that no "certified police academy in Missouri" teaches it. Available on-line at http://www.ago.state.mo.us/032003fl.pdf. (last visited, Oct. 3, 2003).

"certainly" wanted her to talk (JA 52). Clinton transported Seibert to the stationhouse, and Hanrahan and Windle followed in their car, discussing their strategy for interrogating her (JA 54-55).

At the police station, Officer Clinton informed Hanrahan that, during the drive, he had told Seibert that "from what he knew, we had a very strong case, and it would be best to tell the truth." (JA 55). Hanrahan placed Seibert in a small interview room, leaving her to sit for fifteen to twenty minutes, expecting this to "create a considerable amount" of stress (JA 56).

At 3:45 a.m., Hanrahan entered the room, pulled his chair close to Seibert, and began interrogating her without providing *Miranda* warnings (JA 34, 56, 59).[4] He told her that he knew she was guilty, that she had been lying to him previously, that her lies were hurting her, and that telling the truth would make her feel better (JA 29, 47). The unwarned interrogation persisted for 30 minutes (JA 30-31, 59). During this time, Hanrahan showed Seibert a picture of Mr. Rector's burned body (JA 57).

Hanrahan wanted to interrogate Seibert without *Miranda* warnings in order to obtain a confession, and then induce her to verify it on tape following *Miranda* warnings (JA 30-32, 34, 38, 937). He described his "technique" this way:

> Basically, you're rolling the dice. You're doing a first stage where you understand that if you're told something that when you do read the *Miranda* rights, if they invoke them, you can't use what you were told. We were fully aware of that. We went forward with the second stage, read *Miranda*, and she repeated the items she had told us. (JA 35-36).

[4] Hanrahan did not turn on his recorder until the second half of the interrogation (JA 30-31, 58-59).

During the first stage, Seibert denied participating in the fire, which was consistent with her prior interviews with Hanrahan (JA 36). But he pressed her until she acceded to his version of events (JA 36-37). Seibert agreed that she knew the house was going to be burned, but she would not agree that she knew Mr. Rector was going to die in the fire (JA 59). So Hanrahan put his hand on her arm, squeezed it, and repeatedly coaxed, "Donald was also to die in his sleep." (JA 59). Seibert was sobbing at this point (JA 59). When she finally said what Hanrahan believed was the truth, he took "a formal statement." (JA 60).[5]

After a brief pause, Hanrahan began the second stage of the interrogation, using a tape recorder (JA 30, 60). The recorded statement "repeat[ed]" the unwarned statement (JA 30). The tape begins with Hanrahan reading the *Miranda* warnings (JA 65-66). Seibert signed a waiver form, and Hanrahan reminded her, "[W]e've been talking for a little while about what happened on Wednesday the twelfth, haven't we?" (JA 60, 66). He told her that he would "try to help [her] along" (JA 60, 66). Turning to the subject of Mr. Rector, Hanrahan reminded Seibert, "Now, in discussion you told us . . . that there was an understanding about Donald." (JA 70). When Seibert agreed, he told her to describe the "understanding." (JA 70). Seibert again denied knowing that others were going to leave him in the fire, "I, I never even thought about it. I just figured they would [get him out of the trailer]." (JA 70). Hanrahan

[5] Even if Seibert had known and asserted her rights, Hanrahan's *modus operandi* suggests that he would have persisted, as he did with Darian. *See State v. Darian Seibert*, 103 S.W.3d 295, 300 (Mo.App.2003) ("[S]till hospitalized for treatment of burns he suffered in the fire, [Darian] was questioned by Officer Richard Hanrahan in a recorded interview . . . [Darian] stated during and immediately after the reading of [his Miranda] rights that he wanted to talk with a lawyer. Hanrahan continued the conversation, referring to evidence that had been gathered, and eventually read [Darian] his rights a second time [and obtained statements].")

immediately confronted Seibert with her unwarned statement, asking, "didn't you tell me that he was supposed to die in his sleep?" (JA 70). Seibert agreed it was possible that he could (JA 70).

Seibert moved to suppress the entire interrogation as violating *Miranda* and as being involuntary (JA 4-5). As Hanrahan expected, the trial court suppressed the unwarned statements, but cautiously admitted the warned one, saying, "[W]e'll see what happens." (JA 40). Hanrahan testified at trial and recounted the tape-recorded statement (JA 42-62).[6] Over renewed objection, the court admitted the tape, its transcript and Seibert's waiver (JA 49-51). The court played the tape, letting jurors follow along with a transcript (JA 48-51, Exs. 37, 42 & 43). They convicted Seibert of second degree murder (JA 2).

The Missouri Court of Appeals affirmed, but the Missouri Supreme Court granted Seibert's application for transfer and reversed (JA 3). It found that Seibert's waiver and subsequent confession were involuntary (Cert. Pet. A-12). Under the specific facts of the case, the Court presumed that withholding warnings was a tactic to elicit a confession by depriving Seibert of the ability to knowingly and intelligently assert or waive her privilege (Cert. Pet. A-12). It found, "[I]n situations such as these, where the accused is subjected to a nearly continuous period of interrogation, it is unreasonable to assume – and there is nothing in the record to support such an assumption – that the simple recitation of *Miranda* would resurrect the opportunity to obtain a voluntary waiver." (Cert. Pet. A-10-A-11).

[6] Petitioner says defense counsel elicited part of the unwarned statements (Pet. Br. 4, fn 2). But the State had already elicited that Hanrahan had a pre-*Miranda* conversation with Seibert and had played the audio tape of the warned statement. (JA 46, 51). The jury had heard Hanrahan reminding Seibert of the specifics of her unwarned statement. (JA 66, 70).

The Court did not create an irrebuttable presumption that a waiver and subsequent statement would always be involuntary where there was a deliberate violation. It noted that, under different facts, the violation might be sufficiently attenuated, such as where the subsequent statements were not coerced because the second interrogation was held the next day, at a different location, and with different officers. (Cert. Pet. A-11).

SUMMARY OF ARGUMENT

This case presents a direct assault on *Miranda v. Arizona*, 384 U.S. 436 (1966) and the Fifth Amendment requirements that this Court recently declared to be so "embedded in routine police practice" that they "have become part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). Hanrahan knew that *Miranda* and its progeny obligated him to advise Seibert of her rights *prior to* any questioning. He nevertheless deliberately withheld what the law demands, seeking to extract a statement. Hanrahan "rolled the dice," betting that judges would look the other way. Missouri has now upped the ante, asking this Court to erase one of *Miranda*'s key holdings and make the mandatory warnings optional. But defiance of the law and this Court's decisions ought not be tolerated or rewarded. This Court should reject Petitioner's bad-faith exception to *Miranda*.

The statement admitted against Seibert was undisputedly the product of Hanrahan's improper tactics and her first, unwarned statement. Hanrahan received orders from the prosecutor to "make a case" against Seibert, and he choreographed an interrogation aimed at doing just that. Calculating a time and place that would maximize her grief and anxiety, Hanrahan directed Seibert's arrest at 3:00 a.m., taking her from the burn unit where her oldest son lay dying, and with the funeral for her younger son scheduled for the next day. He instructed the arresting officer to withhold the required warnings. Then, utilizing

the inherent coercion of the stationhouse, Hanrahan first left Seibert alone in a tiny room to evoke more stress. Upon rejoining her, he accused her of lying, telling her that her lies were hurting her and that he already knew the truth. He confronted her with pictures of Mr. Rector's body. When she continued to deny knowing that Mr. Rector would die in the fire, Hanrahan squeezed her arm and repeated "Donald was to die in his sleep," until, sobbing, she finally agreed with him. Only then, after a brief pause, did he give her warnings. But when "warnings c[o]me at the end of the interrogation process . . . an intelligent waiver of constitutional rights cannot be assumed." *Westover v. United States*, 384 U.S. 436, 496 (1966).

Hanrahan "roll[ed] the dice" because he had been trained that suspects were less likely to assert their privileges after giving an unwarned statement. His gamble paid off; Seibert agreed to talk. Still, Hanrahan could only extract the duplicate statement by exploiting the unwarned statement to prevent any deviations. Only exclusion will deter this two-step technique and provide meaningful protection for the Fifth Amendment. Without strong exclusion, *Miranda* is ineffectual.

Oregon v. Elstad, 470 U.S. 298 (1985) did not invite this two-step technique; in fact, it rejected the "apocalyptic" prediction of it. Rather, *Elstad* provided a safe, but narrow, harbor for officers whose inadvertent failure to warn was reasonable and who did not exploit the existence of the unwarned statement. *Elstad* specifically exempted from its narrow rule "deliberately coercive or improper tactics in obtaining the initial statement." *Id.* at 314. "Improper tactics" are interrogation techniques *likely* to render a confession not the product of a suspect's free will, *regardless* of whether her will was actually overborne. The two-step is an "improper tactic" that renders unattenuated waivers and subsequent statements involuntary.

When coercive or improper tactics are used in "consecutive confession" cases like this one, *Westover* controls and requires the government to prove attenuation between

the statements and the lack of exploitation of the first statement. This is precisely the analysis that the Missouri Supreme Court followed. It did not create a per se rule of exclusion; rather, it correctly followed *Elstad* in rejecting this "calculated," improper tactic and in applying an attenuation analysis to the facts presented. This Court should affirm.

ARGUMENT

I. THIS COURT SHOULD EXCLUDE ALL EVIDENCE ACQUIRED THROUGH HANRAHAN'S WILLFUL AND UNREASONABLE VIOLATION OF *MIRANDA*.

First interpreting the Self-Incrimination Clause, 117 years ago, this Court warned:

> [I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Boyd v. United States, 116 U.S. 616, 635 (1886). This case presents the most serious encroachment upon the Fifth Amendment privilege today: the strategic disregard of the "constitutional requirements" designed to protect it. *Dickerson v. United States*, 530 U.S. 428, 438 (2000). Deliberate *Miranda* violations are no longer "a speculative possibility." *See Oregon v. Hass*, 420 U.S. 714, 723 (1975). The practice is well-documented, and it is spreading.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court sought a comprehensive solution for the problems arising from the combination of custodial interrogation, coercion and compelled self-incrimination. It realized that without proper safeguards, custodial interrogation imposes inherently coercive pressures that undermine a suspect's will to

resist, compelling her to speak when she would not otherwise do so freely. *Id.* at 467. Thus, *Miranda* laid down "concrete constitutional guidelines for law enforcement agencies and courts to follow." *Id.* at 442. Because "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements," *Miranda*'s procedures simultaneously protect the Fifth Amendment privilege and avoid many issues of voluntariness under the Due Process Clause. *See Dickerson*, 530 U.S. at 435, 444.

Miranda has two essential components – one directing police, the other guiding courts. To combat the inherent coercion of the stationhouse and to provide a full opportunity to exercise the privilege, police must effectively apprise the suspect of her rights. Such warnings and a valid waiver must precede any custodial interrogation, and police must heed the suspect's decision to remain silent or consult counsel. *Miranda*, 384 U.S. at 467, 473-474. Courts then must exclude statements obtained during custodial interrogation unless the prosecution shows valid warnings and waiver. *Id.* at 479.

Petitioner assails both components, arguing that warnings should be optional and that statements obtained via deliberate *Miranda* violations should be admitted. It collapses the two components, asking this Court simply to approve any interrogation tactic regardless of its coercive effect. In the thirty-seven years since *Miranda*, this Court has refined the definitions of "custody" and "interrogation" (*see, e.g., Stansbury v. California*, 511 U.S. 318 (1994) (*per curiam*); *Rhode Island v. Innis*, 446 U.S. 291 (1980)), and has let officers question suspects without warnings when necessary for public safety. *See New York v. Quarles*, 467 U.S. 649 (1984). The Court has also occasionally permitted the limited use of evidence obtained through a failure to follow *Miranda*'s procedures, though in every case the failure has not been deliberate. *See, e.g., Harris v. New York*, 401 U.S. 222 (1971); *Michigan v. Tucker*, 417 U.S.

433 (1974). Except to protect public safety, this Court has never held that the warnings are *optional*.

Petitioner's radical revision of *Miranda* would fail to protect the Fifth Amendment privilege and would let officers extract – and courts admit – involuntary statements in violation of the Due Process Clause. This Court should therefore exclude all evidence obtained from objectively unreasonable violations of *Miranda*. Such a rule would accord with this Court's precedents, including *Oregon v. Elstad*, 470 U.S. 298 (1985).

A. Warnings are "constitutionally required," not simply discretionary tools for law enforcement.

Miranda jurisprudence reflects this Court's abiding concern to effectuate the "underlying purposes of the *Miranda* rules," and maintain "the proper balance between society's legitimate law enforcement interests and the protection of the defendant's Fifth Amendment rights." *Moran v. Burbine*, 475 U.S. 412, 424 (1986). Petitioner seeks to tip that careful balance wholly towards law enforcement. But this Court's balanced approach contemplates "legitimate" law enforcement activity, which cannot include the "Missouri two-step." While "questioning is undoubtedly an essential tool in effective law enforcement," *Haynes v. Washington*, 373 U.S. 503, 519 (1963), *custodial* questioning is "legitimate" only when it complies with *Miranda*. The Missouri two-step is calculated to undermine a suspect's free will by subjecting her to coercive interrogation without notice of or opportunity to exercise her rights and then exploiting the product of the unwarned questioning to obtain an "admissible" duplicate. Some police trainers reject this tactic,[7] but Hanrahan and

[7] The Reid Institute condemned Petitioner's speculation in its cert. petition that Reid teaches this technique. Its materials "scrupulously

(Continued on following page)

a growing number of officers around the country are being trained to violate *Miranda*.

Miranda binds the police. Absent other fully effective procedures, a suspect *must* receive four warnings *prior to* any questioning: she has the right to remain silent, anything she says can be used against her in a court of law, she has the right to the presence of an attorney, and if she cannot afford an attorney one will be appointed for her prior to any questioning if she so desires. *Miranda*, 384 U.S. at 479. The State concedes this rule's constitutional footing, but asserts that *Miranda* is unconcerned with deterring misconduct and that warnings are optional. This ignores a long history of requiring warnings to protect individuals from police overreaching.

This Court uses only mandatory language when describing the timing of the warnings.[8] Just two terms ago, this Court reiterated that "*there can be no doubt* that a

teach . . . that if a suspect is in custody he/she must first be advised of their Miranda rights and make the appropriate waiver before any questioning can take place." *See* http://www.reid.com/legalupdates.html. (last visited October 3, 2003).

[8] *See e.g.*, *Davis v. United States*, 512 U.S. 452, 457 (1994) (police must explain rights "before questioning begins"); *Stansbury*, 511 U.S. at 322 (a person . . . "must first be warned that he has a right to remain silent . . . "); *Berkemer v. McCarty*, 468 U.S. 420, 429 (1984) ("Prior to any questioning, the person must be warned"); *Tucker*, 417 U.S. at 444 and *Quarles*, 467 U.S. at 654 (1984) (requiring *Miranda* warnings "prior to questioning" reinforces the Fifth Amendment right); *Orozco v. Texas*, 394 U.S. 324, 326 (1969) (statement excluded when officers questioned "without first informing him of his right[s] . . . "); *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (*Miranda*'s "fundamental purpose [is] to assure that *the individual's right to choose* between speech and silence remains unfettered throughout the interrogation process.") (emphasis in original); *Moran*, 475 U.S. at 426 ("*Miranda* . . . giv[es] the *defendant* the power to exert some control over the . . . interrogation") (emphasis in original); *Duckworth v. Eagan*, 492 U.S. 195, 201 (1989) (*Miranda's* safeguards "*require* police to advise . . . *before* commencing custodial interrogation.").

suspect *must* be apprised of his rights against compulsory self-incrimination and to consult with an attorney before authorities may conduct custodial interrogation." *Texas v. Cobb*, 532 U.S. 162, 171 (2001) (citing *Dickerson*, 530 U.S. at 435, and *Miranda*, 384 U.S. at 479).[9] It also uses mandatory language in requiring officers to honor clear invocations of rights.[10]

Against the weight of these cases, Petitioner objects that this Court lacks authority to "mandate a code of behavior for state officials wholly unconnected to any federal right or privilege." (Pet. Br. 10-11) (quoting *Moran*, 475 U.S. at 425). But Petitioner ignores that *Miranda*'s procedures are directly tied to "a federal right or privilege" – the Fifth Amendment – making Petitioner's weak protest irrelevant. Indeed, *Dickerson* struck down a

[9] All emphasis in quoted materials has been added, unless otherwise noted.

[10] *See, e.g., Davis*, 512 U.S. at 458 ("If a suspect requests counsel at any time during the interview, he is not subject to further questioning."); *McNeil v. Wisconsin*, 501 U.S. 171, 176-77 (1991) ("Once a suspect asserts the right [to counsel], . . . interrogation [must] cease."); *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990) ("When counsel is requested, interrogation must cease."); *Arizona v. Roberson*, 486 U.S. 675, 682 (1988) ("After a person in custody has expressed his desire to deal with the police only through counsel, he 'is not subject to further interrogation.'") (quoting *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1980)); *Barrett*, 479 U.S. at 528 ("Once the accused 'states that he wants an attorney, the interrogation must cease.'") (quoting *Miranda*, 384 U.S. at 474); *Edwards*, 451 U.S. at 485 (once the right to counsel is "exercised by the accused, 'the interrogation must cease.'") (quoting *Miranda*, 384 U.S. at 474); *Innis*, 446 U.S. at 293 ("In *Miranda* [ ], the Court held that, once a defendant in custody asks to speak with a lawyer, all interrogation must cease until a lawyer is present.") (citation deleted); *Fare v. Michael C.*, 442 U.S. 707, 719 (1979) ("An accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease."); *Miranda*, 384 U.S. at 473-74 ("If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.") (footnote omitted).

federal statute, 18 U.S.C. § 3501, as unconstitutional *precisely because it failed to require pre-interrogation Miranda warnings* or provide equally effective alternatives to protect the privilege:

> *Miranda* requires procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored. *See, e.g.*, 384 U.S. at 467 . . . [Section] 3501 explicitly eschews a requirement of pre-interrogation warnings in favor of [viewing] the administration of such warnings as only one factor in determining the voluntariness of a suspect's confession. The additional remedies cited by *amicus* do not, in our view, render them, together with § 3501 an adequate substitute for the warnings required by *Miranda*.

Dickerson, 530 U.S. at 442. As Justice Kennedy noted last term, "[o]ur cases and our legal tradition establish that the Self-Incrimination Clause is a substantive constraint on the conduct of the government, not merely an evidentiary rule governing the work of the courts." *Chavez v. Martinez*, 123 S.Ct. 1994, 2014 (2003) (Kennedy, J., concurring in part and dissenting in part). "The *Miranda* warning, as is now well settled, is a constitutional requirement adopted to reduce the risk of a coerced confession and to implement the Self-Incrimination Clause." *Id.* (citing *Dickerson*, 530 U.S. at 444).

Petitioner contorts *Chavez*, *supra*, to argue that if the Fifth Amendment is only violated at trial, protecting the privilege is not required and deliberate police misconduct need not be deterred (Pet. Br. 40). In *Chavez*, four members of this Court concluded that the Fifth Amendment is violated only when compelled evidence is admitted at a criminal trial. This holding is not inconsistent with a belief that *Miranda*'s procedures are also required *to protect* the privilege. Even if the Fifth Amendment is violated only when compelled testimony is introduced, rules that regulate out-of-court conduct provide guidance to police and

reduce the "unacceptably great" risk that compelled statements *will* be admitted. *See Dickerson*, 530 U.S. at 442. Three other members of this Court agreed with Martinez that the Fifth Amendment *can* be violated by coercive out-of-court conduct, and two members concluded only that out-of-court compulsion, not violating the Fifth Amendment, does not warrant civil damages.

The plurality holding in *Chavez* is precisely why protecting the core guarantee must emanate from a robust exclusionary rule in the criminal case. This case, unlike *Chavez*, clearly implicates the core Fifth Amendment value: Seibert's statement *was* admitted against her at trial. With no civil remedy to directly counteract willful violations, exclusion remains the only powerful tool at this Court's disposal to ensure that police officers respect *Miranda* in the stationhouse and do not flout *Dickerson's* constitutional command. 530 U.S. at 434-435. Expanded protection of the privilege is justified when the core guarantee, or the judicial capacity to protect it, would be placed at risk in the absence of such complementary protection. *See Chavez*, 123 S.Ct. at 2007 (Souter, J., concurring). Deliberate or objectively unreasonable *Miranda* violations endanger both the core guarantee and this Court's capacity to protect it.

The United States concedes that "Miranda itself does contain language that purports to establish rules for the conduct of the police" and that later cases "speak of assessing whether particular applications of the Miranda exclusionary rule would deter departures from those procedures." (U.S. Amicus Br. 19). Indeed, such regulation provides the only "assurance that practices of this nature will be eradicated in the foreseeable future." *Miranda*, 384 U.S. at 447.[11] "The Constitution is based upon the theory

[11] It is not only this Court that has understood *Miranda* to regulate police conduct. The Solicitor General has argued that "*Miranda* regulated the conduct of police custodial interrogation by devising

(Continued on following page)

that when past abuses are forbidden the resulting right has present meaning." *Chavez*, 123 S.Ct. at 2013 (Kennedy, J., concurring in part and dissenting in part). And "exclusionary rules are very much aimed at deterring lawless conduct by police . . . " *Colorado v. Connelly*, 479 U.S. 157, 169 (1986) (addressing *Miranda* exclusion). The "core virtue of *Miranda* would be eviscerated if the prophylactic rules were freely [ignored] by . . . courts under the guise of [reinterpreting] *Miranda*. . . . " *Quarles*, 467 U.S. at 664 (O'Connor, J., concurring and dissenting in part) (*quoting Fare v. Michael C.*, 439 U.S. 1310, 1314 (1978) (Rehnquist, J., in chambers on application for stay)). "An argument that a rule of law may be ignored, avoided, or manipulated simply because it is 'prophylactic' is nothing more than an argument against the rule of law itself." *Michigan v. Harvey*, 494 U.S. 344, 369 (1990) (Stevens, J., dissenting). But, this is exactly what Petitioner seeks: the elimination of Fifth Amendment protection by extending *Elstad* to encompass deliberate and objectively unreasonable *Miranda* violations. This Court must decline.

B. *Miranda* warnings cannot serve their protective purpose unless they are given "at the outset" of questioning.

"A reasonable and faithful interpretation of the *Miranda* opinion must rest on the intention of the Court . . . to adopt 'fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the

prophylactic safeguards," and "it was the psychological technique of subtly instilling that fear in a suspect in custody that *Miranda* sought to counteract through the requirement of warnings." (*Illinois v. Perkins*, U.S. Amicus Br. 10, 15); and "[W]e also recognize the *Miranda* exclusionary rule is designed to deter abusive police questioning practices." (*Elstad*, U.S. Amicus Br. 7). The Solicitor General's understanding of *Miranda* has definitely "evolved."

right will be scrupulously honored.'" *Michigan v. Mosley*, 423 U.S. 96, 104 (1975). "[T]he *Miranda* decision . . . was designed to give *meaningful* protection to Fifth Amendment rights." *Mathis v. United States*, 391 U.S. 1, 4 (1968). The Missouri two-step gives no "meaningful" or "fully effective" protection.

Petitioner claims that the warnings were "carefully" and "proper[ly]" administered at the outset of the "second interrogation." (Pet. Br. 26, 47). This ignores the Missouri Supreme Court's factual finding that Hanrahan conducted *one* continuous interrogation in two stages (Cert. Pet. A-12). The two-step did not "adhere to the dictates of *Miranda*." Of course, "it is entirely possible to extract a compelled statement despite the most precise and accurate of warnings." *Withrow v. Williams*, 507 U.S. 680, 712-713 (O'Connor, J., dissenting) (1993). But the question is not whether warnings are recited by rote, but whether the warnings provided a "fully effective means" of protection. *Mosley, supra*.

In *Miranda*, this Court made clear that midstream warnings are *not* effective and result in an involuntary waiver. *See Westover*, 384 U.S. at 494-497 (when "warnings c[o]me at the end of the interrogation process . . . an intelligent waiver of constitutional rights cannot be assumed."). "Proper administration" does not contemplate post-confession warnings, but giving them "at the outset of the interrogation" and "prior to questioning." *Miranda*, 384 U.S. at 467-68, 479. To pretend that a new interrogation began after a "momentary cessation" would frustrate *Miranda*'s mandate by allowing "repeated rounds of questioning" to undermine the will of the suspect. *Mosley*, 423 U.S. at 102 (Mosley received full *Miranda* warnings "at the very outset of *each* interrogation"). Only after a pronounced break could Seibert have returned to the status quo ante of a suspect not under the pressure of interrogation.

To assert that Hanrahan "carefully administered" the warnings at the outset of the "*second* interrogation,"

Petitioner has had to drastically restructure its description of the facts. In its cert. petition, it described this technique as "an interrogation . . . in two stages." (Cert. Pet. 4). But in its brief, Petitioner describes "two interrogations" (Pet. Br. 20). The obvious reason for this change is that it allows Petitioner to argue that the warnings were given at the "outset" of the second, purportedly cleansing the violation.

This Court should not accede to such a ploy. Hanrahan did not administer warnings at a meaningful time or in a meaningful manner. This Court has long refused to "give any weight to recitals which merely formalize constitutional requirements," warning that "formulas of respect for constitutional safeguards . . . may not become a cloak for inquisitorial practices and make an empty form of the due process of law for which free men fought and died to obtain." *Haley v. Ohio*, 332 U.S. 596, 601 (1948). Haley was taken from his home in the middle of the night and questioned at the police station without advisement of his right to counsel. His confession was reduced to writing, preceded by rote warnings. While Haley agreed to the written confession, this Court found that he could not appreciate the belated advisement or freely exercise his rights.

Describing the "callous attitude of the police towards the procedural safeguards," this Court took "with a grain of salt" the officer's assurances that he interrogated Haley "in a fair and dispassionate manner." *Id.* This Court should likewise view with skepticism Petitioner's assurances that the unwarned questioning of Seibert was not coercive. The Missouri Supreme Court held that only "under circumstances that differ from those in [Seibert's] case" could Petitioner show that the first statement was voluntary (Cert. Pet. A-9). Hanrahan's two-step technique mirrors the coercive tactics that *Miranda* sought to counteract, and the belated warnings gave Seibert no meaningful ability to choose between speech and silence. As this

case demonstrates, belated warnings do little to prevent involuntary statements.

Factually, the 15-20 minute pause in questioning cannot be distinguished from the common situation where an officer leaves the room to check on other evidence. This pause was nothing but an intermission during one interrogation. At its logical end, Petitioner's argument would allow an officer to reduce an unwarned statement to writing, prefaced by written warnings. If the suspect reads and signs the statement, it would then be admissible. But this Court has rejected that procedure. *See Davis v. North Carolina*, 384 U.S. 737, 740 (1966).

For a suspect ignorant of her rights, withholding warnings until a statement is extracted fails to provide a meaningful choice between speech and silence. But an express violation of *Miranda* may have a greater impact on a suspect who *knows* her rights. Most citizens reasonably believe that the police are supposed to obey the law while enforcing the law. *Spano v. New York*, 360 U.S. 315, 320 (1959). But when a suspect concludes that the officer has no regard for her rights or for the law itself, that conclusion may generate fear that any refusal to comply with demands for answers will trigger police retaliation. The suspect's realization that *Miranda*'s promise is false will make interrogation a more coercive experience than it is already.[12]

Dickerson reaffirmed the timing of the warnings by holding that a federal statute that "eschew[ed] a requirement of *pre-interrogation* warnings" failed to provide constitutionally adequate protections for the Fifth Amendment privilege. 530 U.S. at 442. The two-step is based on a fear that, if warned, a suspect will invoke her rights. But "no system of criminal justice can, or should,

[12] *See* Charles D. Weisselberg, *Saving* Miranda, 84 Cornell L. Rev. 109, 153-162 (1998).

survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that . . . an accused . . . will become aware of, and exercise, [her] rights." *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964).

C. If this Court permits the use of evidence obtained in deliberate violation of *Miranda*, officers nationwide will be trained to do the "Missouri two-step."

A decade ago, this Court had "little reason to believe that the police [were] unable, or even generally unwilling, to satisfy *Miranda*'s requirements." *Withrow*, 507 U.S. at 695. The dissent also believed it could "depend on law enforcement officials to administer warnings in the first instance." *Withrow*, 507 U.S. at 714 (O'Connor, J., dissenting). Officers have "adjusted to [*Miranda*'s] strictures." *Quarles*, 467 U.S., at 663 (O'Connor, J., concurring in part and dissenting in part) (*quoting Innis*, 446 U.S. at 304) (Burger, C.J., concurring). But the growing trend of willful *Miranda* violations must give this Court pause. "Adjustment" to *Miranda* did not contemplate strategically withholding the warnings. Trust that officers are following *Miranda* is necessarily eroded by proof to the contrary. Far from a "dearth of horribles,"[13] deliberate *Miranda* violations have become a stark reality. The scope of exclusion is subject to change in light of changing judicial understanding about the effects of the rule outside the courtroom. *See*

[13] In *Atwater v. City of Lago Vista*, 532 U.S. 318, 353-354 (2001), the "dearth of horribles" referred to Petitioner's inability to show "anything like an epidemic of [warrantless] minor-offense arrests." *See also Cobb*, 532 U.S. 171 (Scrupulous adherence to *Miranda's* pre-interrogation warning requirement will prevent a "parade of horribles" involving violations of constitutional rights).

United States v. Leon, 468 U.S. 897, 928 (1984) (Blackmun, concurring).

Petitioner concedes that "[l]aw enforcement officers recognize the value of questioning suspects 'outside *Miranda*'" and that "there are already nationwide efforts to encourage officers to do so." (Cert. Pet. 16-17). "[V]arious techniques" can "overcome the perceived 'obstacles' created by *Miranda*." (Cert. Pet. 3-4). The record in this case – together with Petitioner's unabashed arguments – show that officers will violate *Miranda* if given room to do so.

Beyond Petitioner's concessions, willful violations are well-documented.[14] Widely-distributed training materials encourage officers to disregard *Miranda*'s procedures. *See, e.g.*, Weisselberg, 84 Cornell L. Rev. at 189-92 (reprinting transcript of training video). The sobering experience of the California courts proves that a strong rule of exclusion is necessary for *Miranda*'s survival. For years, California officers were taught to question suspects in violation of *Miranda*. Courts were often called to adjudicate the admissibility of statements taken without warnings or over invocations. Sharply condemning[15] these tactics had no deterrent effect.[16]

---

[14] *See, e.g., State v. Knapp*, 666 N.W.2d 881 (Wis. 2003) (intentional failure to give warnings); *People v. Neal*, 72 P.3d 280 (Cal., 2003) (deliberate questioning over invocation); Elwood Sanders, Jr., *Willful Violations of Miranda: Not a Speculative Possibility but an Established Fact*, 4 Fla. Coastal L.J. 29 (2003) (surveying willful violations of *Miranda* and *Edwards* in 12 states); Charles D. Weisselberg, *In the Stationhouse After Dickerson*, 99 Mich. L. Rev. 1121, 1123-1153 (2001) (collecting "outside *Miranda*" California training materials); Charles D. Weisselberg, *Saving* Miranda, 84 Cornell L. Rev. 109 (1998) (reviewing the practice and theory of questioning "outside *Miranda*").

[15] *See, e.g., People v. Bradford*, 929 P.2d 544 (Cal. 1997) ("unethical" and "strongly disapproved."); *In re Gilbert E.*, 38 Cal.Rptr.2d 866 (Cal.App.1995) ("respect for the . . . law necessarily diminishes"); *People v. Bey*, 27 Cal.Rptr.2d 28 (Cal.App.1993) (expressing grave concern at

(Continued on following page)

This year, the California Supreme Court revisited the issue in *People v. Neal*, 72 P.3d 280 (Cal., 2003). This time, when another officer deliberately questioned a suspect over his repeated requests for counsel, the Court ruled that Mr. Neal's statement was involuntary and inadmissible for all purposes. A unanimous Court angrily noted that it had condemned this tactic time and again. *Id. Neal's* facts also demonstrate how abandoning *Miranda*'s bright line substantially increases the risk of a coerced confession.

Training materials from the California Department of Justice confirm that these practices persist, even as they are condemned by courts. One trainer noted that tainted statements had been held involuntary, but he did not advise officers to stop:

> [W]e on this program, or some of us in this program, have been encouraging you to continue to question a suspect after they've invoked their *Miranda* rights . . . [D]espite the fact we've been encouraging you to do this for the last eight years, some judges . . . have taken exception to that and everybody's entitled to their opinion, and certainly judges are entitled to think that "You know, that's just not a good idea." But some judges in the courts of appeals have gone so far as to find a way to prohibit those kinds of statements from coming in even for impeachment purposes.
>
> * * *

---

deliberate *Miranda* violation); and *People v. Baker*, 269 Cal.Rptr. 475 (Cal.App.1990) (deploring intentional *Miranda* violations).

[16] The California Supreme Court's unanimous condemnation in *People v. Peevy*, 953 P.2d 1212, 1224-1226 (Cal. 1998), had no impact. *See* Weisselberg, *In the Stationhouse After Dickerson*, 99 Mich.L.Rev. at 1148-52. A broadcast training video described the Court's warning as non-binding "dicta," and a training bulletin urged, "If you've caught the fish, don't fret about losing the bait." *See id.* at 1137-38, 1144.

> What it means is, our job is getting harder with respect to obtaining information from a suspect after they've invoked their *Miranda* rights. I'm not telling you, "Stop questioning him after that." The law under *Harris v. New York* . . . is what it is . . . and we want to take advantage of that to the extent that we can, but we need to be mindful that some judges, in some recent cases have come out with language that severely frowns upon this practice, and are going to presume that that practice is eliciting involuntary statements. What that means is, that in addition to getting them to make additional statements, you also have to establish something that we can use as evidence that these statements were voluntarily made.

Calif. Comm'n on Peace Officer Standards and Training ("POST") training video, *Miranda: Post-Invocation Questioning* (July 11, 1996).[17]

Further, this trainer provides a glimpse into what the criminal justice system can look forward to if the *Miranda* rules become optional:

> Somehow . . . you need to have the suspect to acknowledge a willingness to continue to speak even after he's invoked his *Miranda* rights.
>
> So for example, you read him his *Miranda* rights, and he invokes his right to silence. What can you do? You can ask him something like this: "Would it be O.K. if I continue to ask you a few questions about something related or even peripheral to the case?" Get him to acknowledge that it would be O.K. for you to continue to ask him those questions, or if he invokes his right to silence,

[17] This video was broadcast by ("POST") to officers statewide. A transcript of the video is available online at: http://www.cacj.org/policy_statements/policy_statement_12.htm.

> you could say, "Lookit, would it be O.K. if I turn the tape recorder off?" or "Would it be O.K. if I had my partner step out of the room and just you and I talked just one-on-one." If after setting the criteria, he acknowledges a willingness to talk or to answer some of your questions, at least that puts something on the record that we have acknowledging that these additional statements that he's going to be giving are voluntarily made.

Miranda: Post-Invocation Questioning, *supra*.

The Solicitor General argues that officers will still give warnings even if they are made optional (U.S. Br. at 20), but the evidence indicates otherwise.[18] Making warnings hortatory instead of mandatory will leave law enforcement with no meaningful guidance, requiring more courts to confront difficult voluntariness issues. There cannot be a gulf between the two halves of *Miranda*'s solution – provisions that bind officers and those that bind courts – or this Court risks returning to the pre-*Miranda* status quo, where only the Due Process Clause measures police actions and a statement's admissibility.

Elstad has not deterred objectively unreasonable *Miranda* violations. Petitioner agrees that deterrence is "limited" under *Elstad*, but suggests that "barring only the use of the unwarned statement [from] the prosecutor's case in chief would be a sufficient [deterrent] . . . " (Pet. Br. 40) (*citing Harris*, 401 U.S. at 225). However, "the deterrence of the exclusionary rule, of course, lies in the necessity to give the warnings." *Hass*, 420 U.S. at 723. Harris

[18] The Solicitor General argued differently in *Dickerson*, noting that without a warning requirement, "although many [officers] would continue to [warn], it is likely that some police departments would become less rigorous in requiring warnings, others might significantly modify them, and some police officers would [not give] warnings at all before conducting custodial interrogation." (*Dickerson v. U.S.*, Resp. Br. at 37.)

and Hass received timely warnings. Whatever deterrent effect results from suppressing an unwarned confession is eliminated if *Elstad* is read to allow officers to deliberately withhold warnings in order to gain an inadmissible confession and then "recover" the lost confession by simply reading the warnings and continuing the interrogation. *See* David A. Wollin, *Policing the Police: Should Miranda Violations Bear Fruit?*, 53 Ohio St. L.J. 805, 817 (1992). The likely result is that the Missouri two-step will spread more quickly if given this Court's imprimatur.

The prosecution cannot build its case with evidence that contravenes constitutional guarantees and their corresponding judicial protections. *Harvey*, 494 U.S. at 351. This Court has rejected arguments that would let a *defendant* turn the Government's illegally-obtained evidence to his advantage. *Harris*, 401 U.S. at 224; *Hass*, 420 U.S. at 722. The same should apply when the Government seeks to benefit from its illegal methods. When officers endeavor to undermine the privilege, this Court must intervene.

D. This Court should exclude all evidence obtained through deliberate or objectively unreasonable violations of Miranda.

When evaluating the propriety of an exclusionary rule, this Court "must consider whether the sanction serves a valid and useful purpose," keeping in mind that "[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct . . . " *Tucker*, 417 U.S. at 446-447. The valid and useful purpose here could not be more clear-cut. Willful *Miranda* violations are becoming widespread. Officers are being trained to violate *Miranda*. More and more suspects across this nation are being subjected to custodial interrogations without warnings or over invocations. Those presumed innocent are not getting notice of, or the opportunity to be heard on, the exercise of their rights. The warnings that were designed to safeguard

citizens' "precious Fifth Amendment rights" are being marginalized, or worse, treated as optional.

A decade before *Elstad*, this Court noted that the Fourth Amendment's exclusionary rule serves "to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it." *Id.* (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)). It acknowledged that "in a proper case this rationale would seem applicable to the Fifth Amendment as well." *Id.* at 447. This deterrence rationale did not apply to *Tucker*, because the police had acted in good faith – they had followed the requirements of *Escobedo*, *supra*, the governing case law at the time. *Tucker*, 417 U.S. at 447. Therefore, bad-faith police conduct would not be significantly deterred if the derivative evidence were excluded. *Id.* at 447-448. Nor would exclusion make sense in *Elstad*, as the officer's failure to warn was inadvertent and excusable, and the officer did not exploit the mistake. By contrast, this is the proper case to apply an exclusionary rule. Hanrahan's conduct was both willful and inexcusable, and to ensure continued protection of the privilege, future violations must be deterred.

This Court should hold that when officers deliberately violate *Miranda* or withhold warnings when a reasonable officer under the circumstances would recognize the necessity to give them, both the warned and the unwarned statements will be presumed inadmissible. To counter that presumption, the government must show both attenuation between the statements and no exploitation of the unwarned statement.

Miranda itself contains an exclusionary rule. Officers must give warnings and allow the suspect an opportunity to invoke her rights. Exclusion deters violations of these procedures and ensures the reliability of trial testimony. If warnings are constitutionally required, *Dickerson*, *supra*, then they necessitate specific remedies to insure compliance. In every context where this Court has recognized obligatory rules of police conduct, it has concluded that

excluding derivative evidence is essential for meaningful deterrence of violations. *Miranda* deserves respect, and officers like Hanrahan will be deterred from doing the Missouri two-step only if its derivative evidence is suppressed. Otherwise, the unwarned statement will infiltrate the government's case-in-chief, as it did here, through an end-run of a constitutional rule.

1) This Court has applied the derivative evidence doctrine even to nonconstitutional violations.

Whether the two-step violates the Constitution or constitutional requirements, this Court has excluded derivative evidence of even nonconstitutional violations. In fact, the phrase "fruit of the poisonous tree" long predates *Wong Sun v. United States*, 371 U.S. 471 (1963). The first "tree" was not a constitutional violation. In *Nardone v. United States*, 308 U.S. 338 (1939), the government violated a federal wiretap statute, and this Court held that the actual, illegal wiretaps must be excluded from the government's case, but additionally, that the evidence derived from them must also be suppressed. "[T]o forbid the direct use of [illegally obtained evidence] . . . but to put no curb on [its] full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.'" *Id.* at 340. Allowing evidence derived from the illegal method used to obtain the wiretaps "would largely stultify the policy which compelled" exclusion of the wiretaps themselves. *Id.*

This Court again applied the derivative evidence doctrine to a nonconstitutional violation in *Harrison v. United States*, 392 U.S. 219 (1968). There, the prosecution introduced a confession obtained in violation of the

McNabb-Mallory rule.[19] Harrison testified at trial to attempt to rebut the illegally obtained confessions, and he was convicted. That conviction was overturned because the confessions had been admitted. On retrial, the prosecution introduced Harrison's earlier testimony, and he was convicted again. This Court reversed the second conviction noting that if Harrison testified "to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible." *Id.* at 222-223. Harrison's rebuttal testimony had been compelled by the use of the illegally-obtained confession, and could not be used on retrial. *Id.* "[T]he 'essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.'" *Id.* (quoting *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

In *Elstad*, this Court observed that Harrison's Fifth Amendment rights had been "actually violated" when the introduction of the tainted confession, "compel[led] [him] to testify in rebuttal." *Elstad*, 470 U.S. at 316-317. *Elstad*'s use of *Harrison*'s legal construct is important to the analysis here because Harrison's illegal confession was not taken in violation of the Fifth Amendment, but of a "prophylactic" rule. Logically, *Elstad's* reference to *Harrison* acknowledges that the use (or exploitation) of a *Mallory*-tainted (here a *Miranda*-tainted) statement to obtain a subsequent statement results in Fifth Amendment compulsion. Indeed, *Elstad* emphasized that "the officers [did not] exploit the unwarned admission to pressure [Elstad] into waiving his right to remain silent." *Id.* at 316. "Exploitation" is also the key to *Wong Sun* exclusion:

---

[19] The rule suppressed confessions taken during pre-presentment delay. *Mallory v. United States*, 354 U.S. 449 (1957); *McNabb v. United States*, 318 U.S. 332 (1943).

> The . . . question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by *exploitation of that illegality* or instead by means sufficiently distinguishable to be purged of the primary taint.'

Wong Sun, 371 U.S. at 488.

Hanrahan exploited Seibert's unwarned statement to extract a duplicate. Thus, the Missouri Supreme Court correctly concluded that Seibert's second statement was compelled and involuntary. (Cert. Pet. A-9–A-12). But this two-step technique relies upon exploitation and will very often yield involuntary statements. To deter such result, this Court should apply a broad exclusionary sanction to the deliberate or objectively unreasonable withholding of warnings. As the derivative evidence doctrine is concerned with deterring police misconduct that flows from violations of the Constitution, rules protecting the Constitution, or Congressional statutes, there is no logical reason that it should not apply to objectively unreasonable *Miranda* violations. If Congress cannot eliminate the warning requirement, *Dickerson, supra*, neither should the police be allowed to do so.

2) A test focused on objective circumstances is appropriate, but evidence of subjective intent, when available, remains a relevant factor.

When officers act unreasonably in withholding warnings, this Court should exclude all statements obtained, unless the government is able to show that subsequent statements have been attenuated and that the initial unwarned statement has not been exploited to obtain it. An objective test is appropriate. In fact, deterrence theory is designed to redress officers who act in objective bad faith, as Hanrahan did here. "By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in

their future counterparts, a greater degree of care toward the rights of an accused." *Tucker*, 417 U.S. at 447. It is no longer difficult for officers to determine the existence of custody or interrogation, and in the overwhelming number of cases, it will be simple to ascertain whether a failure to warn is unreasonable. The circumstances here, viewed objectively, were calculated to undermine Seibert's ability to exercise free choice during questioning.

When evidence of subjective intent is available, as it is here, it serves to aid the inquiry, but it need not unduly detain the courts. *Elstad*'s rule acknowledges the officer's subjective intent: "[S]imple failures to warn, unaccompanied by any actual coercion or other circumstances *calculated*[20] to undermine the suspect's ability to exercise his free will" do not taint the process. *Id.*, 470 U.S. at 309. The Missouri Supreme Court understood that Hanrahan's intent was relevant when determining the interrogation's effects on Seibert, and it followed *Elstad* in considering his intent (Cert. Pet. A-9). The factual record reflects that the two-step "was a tactic to elicit a confession and was used to weaken Seibert's ability to knowingly and voluntarily exercise her rights." (Cert. Pet. A-9).

Innis, supra, is a good example of how subjective intent can aid the objective inquiry. In *Innis*, this Court applied an objective test when asking whether the police should know that a certain practice is reasonably likely to evoke an incriminating response. But Innis' objective test did not reject subjective inquiry:

> This is not to say that the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke

---

[20] "Calculated" means: deliberate, knowing, premeditated, reasoned, reflective, and willful. *See* http://thesaurus.reference.com/search?q=calculated.

> an incriminating response. In particular, where a [tactic] is designed to elicit an incriminating response from the accused, it is unlikely that [it] will not also be one which the police should have known was reasonably likely to have that effect.
>
> * * *
>
> Any knowledge the police may have had concerning the unusual susceptibility of a defendant . . . might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect.

Id., 446 U.S. at 302, fn 7, 8, 9. Hanrahan knew that Seibert was "grief-stricken." And there was no other reason to arrest her at 3:00 a.m. but to ensure a more pliable suspect.

An objective test would examine the objective characteristics of Hanrahan's encounter with Seibert. A reasonable officer would have known that warnings were required when the interrogation began. But in *Elstad*, reasonable officers could have disagreed about custody, making it objectively reasonable not to give warnings. *Elstad* forgives the officer in this respect.[21] Reasonable officers could *not* disagree about Hanrahan's choreographed arrest and interrogation. Warnings were objectively required, but he instructed the arresting officer to withhold them, and he withheld them himself. This tactic is calculated to undermine Seibert's free will, and it did. The Missouri Court did not err, but followed *Elstad*, in considering Hanrahan's intent as part of the totality of the circumstances.

Petitioner also contorts *Moran*, *supra*, to support its argument. Petitioner notes that *Moran* focused on objective circumstances and their effect on the suspect. *Id.*, 475

[21] *Elstad* has been described as a "slippery" custody case. *Withrow*, 507 U.S. at 711 (O'Connor, J., dissenting).

U.S. at 425. But *Moran* involved the police treatment of an attorney, not the suspect: "Clearly, a rule that focuses on how the police treat an attorney – conduct that has no relevance at all to the degree of compulsion experienced by the defendant during interrogation – would ignore both *Miranda*'s mission and its only source of legitimacy." *Id.* at 425. "Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right." *Id.* at 422.

Moran held that officers need not tell a suspect that an attorney is attempting contact. Read in context, the conclusion that "the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of the respondent's election to abandon his rights" makes sense. *Id.* at 423. But that does not aid Petitioner here. Unlike the failure to inform Burbine of an attorney's presence, the failure to notify Seibert of her rights directly affected the quality of her decision. Hanrahan withheld the very information that was constitutionally-required for Seibert to make an informed choice. Burbine was advised of his rights: "the Providence police followed these procedures with precision . . . administer[ing] the required warnings . . . and obtain[ing] an express written waiver prior to eliciting each of the three statements." *Id.* at 420. There was no causal link between the improper tactics and Burbine's waiver.

Petitioner also notes that in *Whren v. United States*, 517 U.S. 806, 810-813 (1996), this Court held that an officer's subjective intent is irrelevant to the validity of a traffic stop that is justified objectively by probable cause.[22] Hanrahan's interrogation of Seibert while withholding her

[22] *Whren* appears to have been a reluctant compromise because the Court "could discern no other, workable rule." *Maryland v. Wilson*, 519 U.S. 408, 422 (1997) (Kennedy, J., dissenting).

warnings is not objectively justified. Just four years later, this Court refused to extend *Whren* to the checkpoint program in *Indianapolis v. Edmond*, 531 U.S. 32 (2000). Instead, this Court looked subjectively into the "primary purpose" behind the checkpoint. This Court recognized the difficulties with subjective inquiry, but noted that "courts routinely engage in this enterprise in many areas of constitutional jurisprudence as a means of sifting abusive governmental conduct from that which is lawful." *Id.* at 46-47. As a result, "a program driven by an impermissible purpose may be proscribed while a program impelled by licit purposes is permitted, even though the challenged conduct may be outwardly similar." *Id.* at 47. "The program must be a bona fide effort to implement an authorized regulatory policy rather than a pretext for a dragnet search for criminals." *Edmond v. Goldsmith*, 183 F.3d 659, 665 (7th Cir. 1999) (analysis approved by *Edmond*, 531 U.S. at 47).

A court should look first at the objective circumstances of an interrogation, and in the overwhelming number of cases, that will decide the issue of reasonableness. Where there is also evidence of subjective intent, as there is here, that evidence can aid the inquiry. Hence, it is permissible to examine the goal of the Missouri two-step, as a factor in an objective test because "the purpose behind the [technique] is critical to its legality." *Id.* In the *Miranda* context, the advice of warnings must be a "bona fide effort" (i.e., a "fully effective means") to protect the privilege, not a circumvention of it.[23]

[23] One year after *Edmond*, Justice O'Connor again distinguished *Whren* noting the "significant qualitative differences between a traffic stop and a full custodial arrest." *Atwater*, 532 U.S. at 365-366 (O'Connor, J., dissenting) "While both are seizures that fall within the ambit of the Fourth Amendment, the latter entails a much greater intrusion on an individual's liberty and privacy interests." *Id.* Likewise,

(Continued on following page)

Moreover, when misconduct is deliberate, police are more likely to exploit it, as happened here, to gain unfair advantage over the suspect.[24] That is precisely why *Elstad* is narrowly confined to circumstances of "inadvertent oversight" and "mere failures to warn" – under such facts, this Court can rest assured that the suspect is protected from police overreaching, law enforcement is protected by the ability to correct pure mistakes, and the *Miranda* doctrine remains balanced.

E. Petitioner's proposed bad-faith exception to *Miranda* represents an extravagant extension of *Oregon v. Elstad*.

Elstad did not condone or invite the deliberate withholding of warnings. It denounced the "apocalyptic tone" of a dissenting prediction that deliberate violations would become routine. *Id.* at 318.[25] This Court made clear that *Elstad* "in no way retreats from the bright-line rule of *Miranda*." *Id.* at 317. Petitioner's assertion that the "technique" employed here "roughly approximates what occurred in *Elstad*,"[26] rings hollow (Cert. Pet. 4). But its further assertion – that law enforcement relied on *Elstad*

there are "significant qualitative differences" between the circumstances of *Elstad* and *Seibert*.

[24] "Long before *Miranda* . . . the Federal Bureau of Investigation had adopted a practice of administering warnings . . . before questioning . . . [in part] to ensure that agents treat suspects fairly . . . " (*Dickerson*, Resp. Br. at 33).

[25] Justice Brennan feared that the majority opinion would let police question a suspect twice – once inadmissibly, and once admissibly. *Id.* at 358 (Brennan, J., dissenting).

[26] Not even *Miranda's* dissenters would agree: "It is difficult to imagine the police duplicating in a person's home . . . those conditions and practices which the Court found prevalent in the station house . . . thought so threatening to the right to silence." *Orozco*, 394 U.S. at 329-330 (White, J., dissenting).

to develop "outside Miranda" questioning – goes too far (Cert. Pet. 3-4). Nothing in *Elstad* encouraged a belief that misconduct is permissible. Petitioner's proposed bad-faith exception to *Miranda* must be rejected.

Elstad introduced a narrow rule, based on this Court's concern that simple procedural errors, without more, should not destroy entire investigations. It provided a "safe harbor" where unexploited technical violations could be corrected. As portended by Justice Stevens, "the Court intends its holding to apply only to a narrow category of cases" where initial questioning occurs in a totally uncoercive setting and where the first confession had no influence on the second. *Id.* at 364. The majority did not reject this assessment.

If *Elstad* lies at one end of the spectrum of police conduct, *Seibert* anchors the other. In the context of exclusion, different violations "call for significantly different judicial responses . . . the clearest indication of attenuation [is required] in cases in which official conduct was flagrantly abusive . . . [a]t the opposite end of the spectrum lie 'technical' violations of . . . rights where, for example, officers in good faith arrest an individual in reliance on a warrant later invalidated." *Brown v. Illinois*, 422 U.S. 590, 610-612 (1975) (Powell, J., concurring). Similar distinctions can be drawn between the "technical" failure to warn during a brief encounter at a suspect's home and the calculated withholding of warnings during custodial stationhouse interrogation. While both are "custodial interrogations" falling within *Miranda*'s protection, the latter entails a greater "potentiality for compulsion" and risk to an individual's liberty interests. *Elstad* left the door open to exclude the latter.

Elstad regarded the officer's breach of *Miranda* as relatively innocent. "The arresting officers' testimony indicates that the brief stop in the living room . . . was not to interrogate [Elstad], but to notify his mother of the reason for his arrest." *Id.* at 315. The breach may have resulted from confusion about custody, or a reluctance to

initiate "an alarming police procedure" without speaking first to Elstad's mother. *Id.* at 315-316. Whatever the reason for the oversight, the incident had none of the "earmarks of coercion." *Id.* at 316. (citing *Rawlings v. Kentucky*, 448 U.S. 98, 109-110 (1980)). "Nor did the officers exploit the unwarned admission to pressure [Elstad] into waiving his right to remain silent." *Id.* But Hanrahan's interrogation involved both "earmarks" and "exploitation."

Interestingly, *Rawlings* is a Fourth Amendment case, wherein the officer's technical violation was not purposeful. *Rawlings* contrasted technical violations with the behavior of the officers in *Brown, supra,* which had "the quality of purposefulness." *Rawlings*, 448 U.S. at 110. And *Brown* cites *Westover*, *supra*, (*Miranda*'s companion involving mid-stream warnings during two-step interrogation), for the proposition that warnings alone and per se do not assure that a violation has not been exploited. *Brown*, 422 U.S. at 603 (citing *Westover*, 384 U.S. at 496-497). *Elstad*'s use of these Fourth Amendment precedents, undeniably connects purposeful or unreasonable violations of *Miranda* with broad exclusionary protection.

1) "Improper tactics" in obtaining a statement is distinct from actual coercion, and constitutes one factor in the totality of the circumstances test.

Elstad carved from its rule an exception for two types of police misconduct: "absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion." *Id.* at 314. Put another way, when deliberately coercive or improper tactics are used to obtain the initial statement a presumption of compulsion *is* warranted. Petitioner is wrong to suggest that these have the same meaning (Pet. Br. 29-30). "Improper tactics" has a distinct meaning as a type of police conduct to be deterred.

The same year as *Elstad*, this Court also noted that the review of a confession's voluntariness "is not limited to instances in which the claim is that the police conduct was 'inherently coercive.'" *Miller v. Fenton*, 474 U.S. 104, 110 (1985). "It applies equally when *the interrogation techniques were improper* only because, in the particular circumstances of the case, the confession is *unlikely to have been* the product of a free and rational will." *Id.*[27] *Elstad's* dual concerns were "actual" coercion and "improper tactics" that likely would yield a confession that was not the product of free will. The *Elstad* facts implicated neither concern. Elstad's statements were not actually coerced, nor were improper tactics used in obtaining the statements. But Hanrahan strategically elevated the inherent coercion of the stationhouse by:

- taking Seibert away from dying Darian at 3:00 a.m., with Jonathan's funeral scheduled for the next day;
- isolating her in a tiny room for 15-20 minutes to increase her stress, aware that another officer had told her they had a strong case against her;
- interrogating her incommunicado and without warnings;
- telling her that her exculpatory statements were lies and were hurting her;
- pulling his chair beside her, squeezing her arm and repeating the story he wanted to hear from her until she acquiesced to it;

[27] *See also McKune v. Lile*, 536 U.S. 24, 49 (2002) (O'Connor, J., concurring) (As suggested by the text of the Fifth Amendment, we have asked whether the pressure imposed in such situations rises to a level where *it is likely* to "compe[l]" a person "to be a witness against himself.").

- using the required warnings to cleanse his improper tactic;
- exploiting her inadmissible statement to chain her to it when she tried to return to her exculpatory statements.

The Missouri two-step is an improper tactic designed to undermine the suspect's free will and is likely to result in compelling a suspect to testify. The Missouri Supreme Court correctly considered these improper tactics as part of the totality of the circumstances surrounding Seibert's interrogation, and found that only "under circumstances that differ from those in this case" could the prosecution prove voluntariness of the first statement (Cert. Pet. A-9). It also reviewed the totality of the circumstances to determine the voluntariness of the waiver and the second statement. It found that the two-step tactic was calculated to weaken Seibert's ability to knowingly and voluntarily exercise her rights, that the waiver came during a "nearly continuous period of interrogation," by the same officials in the same surroundings, and that Hanrahan "tied the two stages of the interview together by using her statements in the first stage to correct her during the second stage." Hence, the waiver and subsequent statements were also found to be involuntary (Cert. Pet. A-9–A-12). However, the Missouri Supreme Court did not create a per se rule of exclusion, noting that different circumstances could reflect attenuation rendering the subsequent waiver and statement voluntary (Cert. Pet. A-11).

In addition to its faulty assertion that *Elstad* was concerned only with "actual coercion," Petitioner would find such coercion only if Seibert had been "terrorized, beaten or deprived of sleep or food" (Pet. Br. 32), thereby protecting the Fifth Amendment privilege only from conduct "shocking the conscience." (Pet. Br. 26). But even Petitioner's case citations prove that this is the wrong standard:

> [T]he constitutional inquiry is *not whether the conduct of state officers in obtaining the confession was shocking*, but whether the confession

> was 'free and voluntary; that is, (it) must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. In other words the person must not have been compelled to incriminate himself. We have held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed. [See *Haynes v. Washington*, 373 U.S. 503 (1963)].

Malloy v. Hogan, 378 U.S. 1, 7 (1964).[28] "A finding of coercion need not depend upon actual violence by a government agent." *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991). "[T]he blood of the accused is not the only hallmark of an unconstitutional inquisition." *Id.* (citing *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960)). Indeed, *Miranda* sought to neutralize the *mental* coercion inherent in the stationhouse. Fifth Amendment compulsion need not "shock the conscience."[29] This Court refuses to "blind [itself] to what experience unmistakably teaches: that even apart from the express threat, the basic techniques [of] secret and incommunicado detention and interrogation . . . are devices adapted and used to extort confessions from suspects." *Haynes*, 373 U.S. at 514-515.

---

[28] The Fourteenth Amendment's Due Process Clause protects against state action that either "shocks the conscience," or interferes with rights "implicit in the concept of ordered liberty." *See Chavez*, 123 S.Ct. at 2011-2012 (Stevens, concurring and dissenting in part).

[29] *Elstad* cites *Westover,* to explain when a "break in the stream" becomes necessary. 470 U.S. at 310. This is also critical because *Westover* did not involve actual coercion – it was not "involuntary in traditional terms." *Miranda*, 384 U.S. at 357. None of the records in *Miranda's* four cases "evidence overt physical coercion or patent psychological ploys." *Id.* What mattered was the forcefully apparent "*potentiality for compulsion*," because none of the officers undertook to give warnings at the outset of the interrogation. *Id.*

In *Berkemer v. McCarty*, *supra*, this Court rejected another attempt to circumvent *Miranda,* unanimously refusing to let officers withhold warnings upon misdemeanor traffic arrests. *Id.*, 468 U.S. at 431. Petitioner Berkemer argued that officers, questioning suspects about misdemeanor traffic offenses, would not use the tactics that so troubled the *Miranda* Court. This Court disagreed. *Id.* at 432. It noted that even if the police, when in doubt about the nature of the underlying criminal conduct, could ensure compliance with the law by giving full *Miranda* warnings, "in some cases a desire to induce a suspect to reveal information he might withhold if informed of his rights would induce the police not to [warn]." *Id.* at 431, fn 13. This Court refused to encourage calculated, unwarned, custodial questioning in *Berkemer*. It must refuse here as well.

Berkemer noted the "Byzantine complexities" of condoning unwarned interrogations:

> [A]t what point in the evolution of an affair of this sort would the police be obliged to give *Miranda* warnings to a suspect in custody? What evidence would be necessary to establish that an arrest for a misdemeanor offense was merely a pretext to enable the police to interrogate the suspect (in hopes of obtaining information about a felony) without providing him the safeguards prescribed by Miranda?

Id. at 431-432. The rule Petitioner advances here begs the same complex questions: At what point in the Missouri two-step would a suspect be entitled to warnings: After the officer obtained a full or partial statement? After the officer decided that interrogation was becoming unduly coercive? When the officer decided that he wanted to procure *admissible* statements? Never? Petitioner's desire to abandon the bright-line rule would leave suspects unprotected and police unguided.

2) The Missouri two-step is premised on police officers extracting the "cat out of the bag."

Officers are keenly aware of the real world value of dragging the cat from the bag. So is the Petitioner. It described the practice in its cert. petition:

> [S]ome law enforcement officers use an interrogation strategy designed to obtain information in two stages: first, the suspect is questioned without being advised of his *Miranda* rights; and second, once an admission has been obtained (i.e., once the 'cat is out of the bag'), the suspect is carefully advised of his *Miranda* rights and questioned again.

(Cert. Pet. 4). Also in March, 2003, Petitioner described the two-step to its officers:

> [Hanrahan] had been trained to use a two-step technique designed to elicit an initial confession before reading the *Miranda* warnings, with the idea that once the suspect confessed, she would repeat the confession following the Miranda warnings . . . he had been taught that suspects are more likely to confess the second time, even after *Miranda* warnings, once they have implicated themselves.[30]

Only now, in its brief, does Petitioner reject what it knows to be true: extracting the cat from the bag will practically guarantee a second confession following belated, ineffectual warnings. Hanrahan knew what Seibert surely did not know – that the initial statement was

[30] *See* fn 1, Missouri Attorney General's *Front Line Report*, a newsletter for Missouri's law enforcement officers. http://www.ago.state.mo.us/032003fl.pdf. (last visited Oct. 3, 2003).

inadmissible.[31] He also understood that Seibert's ignorance of her rights during interrogation would leave her with the "erroneous impression that [she] ha[d] nothing to lose . . . in [deciding] to speak a second or third time." *Darwin v. Connecticut*, 391 U.S. 346, 351 (1968) (Harlan, J., concurring in part, dissenting in part); *see also United States v. Bayer*, 331 U.S. 532, 540 (1947).

In discussing "cat-out-of-the-bag," *Elstad* was unconcerned with moral or psychological "pressures to confess emanating from sources other than official coercion." *Elstad*, 470 U.S. 305. But the facts there did not implicate the danger of official coercion. Instead, it resembled the facts of three other cases.[32] *Elstad* used *Beheler, Innis* and *Mathiason* to analogize the pressure felt by Elstad. They all involved the absence of either custody or interrogation, standing in stark contrast to Hanrahan's procedure.[33]

[31] In the military justice system, an interrogating officer who is aware that a suspect has made an initial statement that would violate Article 31(b) UCMJ (Miranda's military counterpart, predating *Miranda*), can give "cleansing warnings" before re-interrogating. This cleansing warning provides that "any prior illegal admission or other improperly obtained evidence which incriminated me cannot be used against me in a trial by court-martial." *See United States v. Allen*, 59 M.J. 515, 523 (N.M.Ct.Crim.App. 2003).

[32] *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (Suspect spoke to police voluntarily. Not knowing the full consequences of talking, did not make encounter custodial); *Innis*, 446 U.S. at 303 (police did not know Innis was unusually disoriented or upset at arrest, nor were police remarks designed to elicit a response; i.e., no interrogation.); *Oregon v. Mathiason*, 429 U.S. 492, 495-496 (1977) (defendant came voluntarily to the station for ½-hour interview, and was told he was not under arrest, later leaving unhindered. He was not subjected to "official coercion" equaling pressure to confess.)

[33] *Elstad* also cites *McMann v. Richardson*, 397 U.S. 759, 767 (1970) for the proposition that "a defendant's ignorance of the full consequences of his decisions [does not necessarily] vitiate their voluntariness." *Elstad*, 470 U.S. at 316. This makes sense because in *McMann* there was no causal relationship between confession and plea.

(Continued on following page)

Harrison, *supra*, is again instructive. When the prosecution *used* Harrison's illegally-obtained first confession, resulting in Harrison's subsequent statement, this Court observed: "Having 'released the spring' by using the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony." *Harrison*, 392 U.S. at 225. *Harrison*'s observation must hold true here because the causal link between Seibert's two statements is even stronger.

The prosecutor and Hanrahan, frustrated that Seibert did not implicate herself during previous informal questioning, took her into custody to "make a case against" her. This included arresting her at 3:00 a.m., taking her from her dying son, knowing she was grief-stricken, telling her she was hurting herself by lying to them and that she needed to tell the truth because they already had a strong case, leaving her alone in a small room to increase her stress, squeezing her arm and repeating the statement they wanted her to adopt – all in the absence of warnings. Hanrahan managed to extract the cat from the bag. Then, after reciting the warnings, he exploited the unwarned statement: When Seibert tried to return to her pre-interrogation denial, he confronted her with the fact that she had told him something different just minutes before. This is cat-out-of-the-bag theory in practice at the station-house. It is not *Elstad*. By ignoring the barrier of *Miranda*, the Missouri two-step dilutes the effectiveness of warnings, resulting in an involuntary waiver.

F. The Missouri two-step is not necessary to address public safety concerns.

Petitioner urges that unwarned questioning is a "desirable" and "entirely appropriate" tool for obtaining

---

McMann, 397 U.S. at 767. But a causal relationship does link Seibert's statements.

"information in connection with a terrorism plot . . . or to end an ongoing criminal activity . . . " (Pet. Br. 42, U.S. Br. 23). But *Quarles*, 467 U.S. at 649, already permits "questions reasonably prompted by a concern for the public safety." Raising the specter of terrorism here is deceiving because a legitimate interest in thwarting that evil does not require wholesale abandonment of protections for our citizens "precious" Fifth Amendment rights.

But Petitioner goes far beyond public safety concerns, suggesting that the Missouri two-step is also legitimate to aid officers in "locating accomplices or developing evidence against them . . . finding . . . drugs or other contraband; locating a crime victim; or focusing an investigation when there are multiple suspects." (Pet. Br. 42). Petitioner declares that the purpose in arresting Seibert was to "sort out the roles of the various conspirators and focus the investigation" to make appropriate charging decisions among multiple suspects (Pet. Br. 42-43). This is false. To make this argument, Petitioner omits a critical fact from its brief: Hanrahan was operating under explicit orders from the prosecuting attorney to "make a case against" Seibert directly (JA 54).

Hanrahan knew that a confession was "probably the most probative and damaging evidence that [could] be admitted against [her] . . . " *Arizona v. Fulminante*, 499 U.S. at 296 (*quoting Bruton v. United States*, 391 U.S. 123, 139-140 (1968) (White, J., dissenting)). He was not sorting evidence; he was seeking a confession. He used the technique that he was trained in: withhold the constitutionally-required warnings to more easily obtain a statement, and then use it to obtain an "admissible" duplicate. There is too great a danger that such objectively unreasonable techniques will result in involuntary waivers and statements. Therefore, when officers deliberately violate *Miranda* or fail to give warnings, when a reasonable officer under the circumstances would recognize the necessity to give them, both the warned and the unwarned statements should be presumed compelled and inadmissible. To counter that

presumption, the government must show attenuation between the statements and no exploitation. Petitioner cannot do so here.

II. SEIBERT'S WAIVER, WHICH CAME IN THE MIDDLE OF THE INTERROGATION, WAS NOT VOLUNTARY, KNOWING OR INTELLIGENT, AND RENDERED THE SUBSEQUENT STATEMENT INVOLUNTARY.

"The voluntariness of a waiver of [the Fifth Amendment] privilege has always depended on the absence of police overreaching . . . " *Connelly*, 479 U.S. at 170. The Missouri Supreme Court held that, under the totality of the circumstances, Hanrahan's overreaching rendered Seibert's waiver involuntary:

> Hanrahan's [tactic] was intended to deprive Seibert of the opportunity knowingly and intelligently to waive her *Miranda* rights. Both stages of the interview formed a nearly continuous interrogation – she was interrogated by the same officials in the same place with only minutes separating the unwarned and warned questioning. There are no circumstances that would seem to dispel the effect of the *Miranda* violation. For these reasons, Seibert's post-*Miranda* waiver and confession was involuntary and, therefore, inadmissible.

(Cert. Pet. A-12).[34] Petitioner ignores this finding, but does concede that, absent "warnings and *a valid waiver . . . any statement* obtained during custodial interrogation would carry a 'presumption of compulsion' and would not be

[34] The involuntariness of the waiver is necessary to resolving Petitioner's question presented, and it was clearly "passed upon below," allowing review by this Court. *See United States v. Williams*, 504 U.S. 36, 41 (1992).

admissible in the prosecution's case in chief." (Pet. Br. 9). Guided by *Elstad*, the Missouri Supreme Court asked whether Hanrahan used a method calculated to "undermine [Seibert's] free will." (Cert. Pet. A-9) (citing *Elstad*, 470 U.S. at 309). If the mid-stream waiver was involuntary, as the Missouri Supreme Court found, the duplicate statement is inadmissible through standard *Miranda* exclusion.

Petitioner admits that Hanrahan referenced Seibert's unwarned statement as he led her to repeat it, but states that this was not designed to pressure Seibert into "*waiving* [her] right to remain silent." (Pet. Br. 48) (emphasis in original). Petitioner struggles for a distinction because, as it acknowledges, if Hanrahan exploited the unwarned admission to pressure a waiver, "[the] waiver and subsequent statement might very well have been compelled." (Pet. Br. 48). But the constitutionally-required protections did not disappear when belated warnings were recited and a waiver was obtained (albeit involuntarily). Seibert could have invoked her rights at any time, or simply refused to answer any question asked, and this silence could not be used against her. *See Doyle v. Ohio*, 426 U.S. 610, 617 (1976); *Miranda*, 384 U.S. 473-474. In fact, it was at a critical point, as she refused to accede to Hanrahan's description of events, that he exploited the unwarned statement to correct her.

The danger is too great that these tactics will result in unwarned statements and involuntary waivers. If this Court does not apply a broad exclusionary rule to deter this misconduct, it should nonetheless affirm the Missouri Supreme Court's decision that Seibert's waiver and subsequent statement was involuntary. When police officers unreasonably withhold *Miranda* warnings at the outset of custodial interrogation, in a calculated attempt to undermine the suspect's free will, this Court must presume that the improper tactic achieved its goal and rendered the warnings impotent and the waiver involuntary.

Of course, the Government is entitled to attempt to prove attenuation between the statements and a lack of exploitation of the first statement to overcome the presumption. But it cannot do so here. The State carries a "heavy burden" to establish a valid waiver. *Barrett*, 479 U.S. 531. An express written or oral waiver is usually strong proof of its validity, but is not inevitably either necessary or sufficient. *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).

> Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege. *Id.*

Miranda, 384 U.S. at 476.

Echoing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), *Miranda* holds that "[t]he defendant may waive effectuation" of the rights conveyed in the warnings "provided the waiver is made voluntarily, knowingly and intelligently." *Moran*, 475 U.S. at 421. "[N]othing less than the *Zerbst* standard for the waiver of constitutional rights applies to the waiver of *Miranda* rights." *Minnick*, 498 U.S. at 160 (Scalia, J., dissenting). First, the waiver must have been the product of a free and deliberate choice rather than *intimidation, coercion, or deception*; and second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of abandonment. *Moran*, 475 U.S. at 421. The totality of the circumstances must be considered in evaluating the waiver. *Butler*, 441 U.S. at 374-75. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and a full comprehension

may a court properly conclude that the *Miranda* rights were waived. *Id.* (citing *Fare*, 442 U.S. at 725).

In *Westover*, 384 U.S. at 496-97, this Court suppressed a confession because an unwarned, custodial interrogation preceded a warned interrogation that produced a confession. The eventual reading of warnings did not ease the pressure from the first interrogation. *Westover* noted that where continuous questioning occurs in two stages, and where the second stage's warnings come without the defendant being removed both in time and place from the surroundings of the first stage's unwarned inquisition, the second statement must be excluded.

This case involves nearly identical facts. This Court need only apply *Westover*, not extend *Miranda*, as Petitioner claims. Petitioner may reply that *Westover* involved an initial involuntary confession. However, as already discussed, the plain language of *Westover* shows otherwise. None of Miranda's companion cases "[would] have been involuntary in traditional terms." *Miranda*, 384 U.S. at 457.

Westover is the proverbial "bridesmaid" of *Miranda* and it has not gotten much play in the caselaw. This is understandable because questioning of this caliber has been rare – at least until the last decade. Certiorari review was granted in *Elstad*, in part, because "a handful of courts" had been applying *Westover*'s "break in the stream" to cases lacking "coercive circumstances." *Elstad*, 470 U.S. at 317-318. Elstad listed those examples. *Id.* at 310, fn 2. These cases declining to apply *Westover*, are factually parallel to *Elstad* – but more importantly, they are polar opposites of *Seibert*.[35]

---

[35] *See, e.g., Tanner v. Vincent*, 541 F.2d 932, 937 (2nd Cir. 1976) (Second confession not "causally related to the first"; "inadvertent" defect in initial warnings); *United States v. Toral*, 536 F.2d 893, 896-897 (9th Cir. 1976) (Circumstances not inherently coercive; all questioning

(Continued on following page)

These cases show in what factual settings *Westover* does *not* apply. *Elstad* juxtaposes them with cases where *Westover* does apply – cases of "consecutive confessions" accompanied by "overtly or inherently coercive methods which raise serious Fifth Amendment and due process concerns." *Id.* Such cases "[could not] seriously . . . equate" to *Elstad*. *Id.* at 314, fn 3. But they cannot seriously be distinguished from *Seibert*.

For example, *Elstad* cited *State v. Badger*, 450 A.2d 336 (Vt. 1982) as a case that did not equate with *Elstad*. The *Badger* Court relied on *Westover* to hold that the coercive circumstances surrounding the first confession infected a later confession, and that intervening events did not break the causal chain or dissipate its taint. *Id.* at 343.

---

occurred "in the security of Toral's home."); *United States v. Knight*, 395 F.2d 971, 973-975 (2nd Cir. 1968) ("short interrogation" in Knight's home, where he invited police; no "causal relationship" between police misconduct and Knight's confession to FBI.); *State v. Derrico*, 434 A.2d 356, 365-366 (Conn. 1980) (Incomplete initial warnings resulted from Derrico's objections and resistance; first "confession" a general statement, second detailed.); *State v. Holt*, 354 So.2d 888, 890 (Fla.App. 1978) (fact that first of two confessions possibly obtained by improper influences does not necessarily make subsequent confession inadmissible, *provided* improper influences removed.); *Fried v. State*, 402 A.2d 101, 102 (Md.App., 1979) (Cat not improperly induced out of bag, but released voluntarily.); *Com. v. White*, 232 N.E.2d 335, 341 (Mass. 1967) (relation between confessions not so close that facts of one control the other.); *State v. Sickels*, 275 N.W.2d 809, 813-814 (Minn. 1979) (Officers did not detain solely to question in custodial setting; incriminating statement followed warnings.); *State v. Dakota*, 217 N.W.2d 748, 753 (Minn. 1974) (One pre-warning question as to "what happened" did not overcome will such that subsequent warnings had no impact.); *State v. Raymond*, 232 N.W.2d 879, 886 (Minn. 1975) (Raymond not in custody for four days between two confessions; with "time to reflect and seek advice" his will was not so overcome by first admission such that subsequent warnings had no impact.); *Com. v. Chacko*, 459 A.2d 311, 316 (Pa. 1983) (Chacko initiated conversation with police; and police did not attempt to exploit his first statement.)

> A mere fifteen hours after obtaining a confession by concededly illegal methods, the officer used that confession to extract a second one, *wholly for the purpose of* supplementing the first confession. The warnings, designed as a prophylactic measure . . . were insufficient to cure such blatant abuse or to compensate for the coercion in this case.

Id. The "coercive" circumstances in *Badger* involved a late-night interrogation, the deliberate withholding of *Miranda* warnings, "close and intense" questioning of a 16-year old (whose father was present during the entire interrogation), who became emotionally upset and began crying. After 50 minutes, Badger confessed, and "[o]nly then did the police issue the *Miranda* warnings." *Id.* at 340.[36] Seibert cannot be distinguished from the consecutive confession cases to which *Elstad* would have applied *Westover* to exclude the subsequent statement. This Court should find that Seibert's waiver and subsequent statements were involuntary under *Westover*.

CONCLUSION

The Missouri two-step is the classic example of an improper tactic calculated to undermine a suspect's free will. Such tactics will very often result in involuntary waivers and statements, as it did here, which is why this Court must presume compulsion and exclude evidence

---

[36] *See also*, (*People v. Saiz*, 620 P.2d 15 (Colo. 1980) (two hour unwarned custodial interrogation of 16-year-old, violating state law requiring parent's presence, culminating in visit to crime scene); *People v. Bodner*, 75 A.2d 440 (1980) (unwarned confrontation at police station and at scene of crime between police and retarded youth with mental age of eight or nine). Justice Stevens notes that *Elstad* highlighted these cases as examples of "unusually coercive police interrogation procedures." *Chavez*, 123 S.Ct. at 2011.

taken from the willful or unreasonable withholding of warnings. Such exclusion is the only effective way to deter misconduct, ensure the protection of the privilege, and guarantee that involuntary statements will not infect the reliability of the evidence at trial.

If mid-stream warnings are condoned, the "Missouri two-step" will abound. *Miranda* sought an end to secret interrogations of unwarned suspects, *Westover* declared that this tactic of midstream warnings between two parts of an interrogation would result in a presumptively invalid waiver, and *Elstad* rejected even the "apocalyptic" thought of the Missouri two-step. But the apocalypse has arrived. The real question now is whether *Miranda* will remain a potent protector of the privilege, or devolve into an optional strategic tool for the police. Seibert's second statement must be suppressed.

The judgment of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

AMY M. BARTHOLOW
Assistant Public Defender
3402 Buttonwood Drive
Columbia, MO 65202
Phone: (573) 882-9855
Fax: (573) 875-2594

Counsel for Respondent

Supreme Court, U.S.
FILED
NOV 7 - 2003
OFFICE OF THE CLERK

(10)

No. 02-1371

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,
Petitioner,

v.

PATRICE SEIBERT,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

REPLY BRIEF

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

KAREN K. MITCHELL*
Chief Deputy Attorney General
JAMES R. LAYTON
State Solicitor
SHAUN J MACKELPRANG
KAREN P. HESS
Assistant Attorneys General
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-0774

* Counsel of Record

25 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. ENGAGING IN UNWARNED INTERROGATION IS LAWFUL. 1

A. The investigating officer had good reasons to arrest and question respondent immediately after learning of her participation in the murder, and he did not act in "bad faith.". 1

B. No decision of the Court makes the "reasonableness" of the officer's pre-warning actions the test for admitting a post-warning statement; but if the Court is inclined to define "improper tactics" as something other than actually coercive conduct, then the needs of legitimate law enforcement are relevant to the inquiry. 6

II. RESPONDENT'S SECOND, WARNED STATEMENT WAS ADMISSIBLE UNDER EXISTING LAW, AND *MIRANDA*'S EXCLUSIONARY RULE SHOULD NOT BE EXPANDED TO DETER CONDUCT THAT IS NEITHER ILLEGAL NOR IMPROPER. 10

A. The initial unwarned questioning was not actually coercive. 11

B. It is an unwarranted extension of *Miranda* to apply a "fruits" analysis to conduct that is not illegal, and, consequently, "exploitation" of an unwarned statement should only be improper if it is used to obtain a waiver. 12

III. THE COURT SHOULD DECLINE RESPONDENT'S INVITATION TO EXPAND THE SCOPE OF *MIRANDA* AND EFFECTIVELY ELIMINATE *ELSTAD* AND *MIRANDA*'S OTHER PROGENY. . 16

A. Respondent overreaches when she suggests that there is a blanket ban on pre-warning interrogation. 16

B. Respondent's "parade of horribles" has little to do with this case and does not justify an expansion of *Miranda* that would largely eliminate *Miranda*'s progeny. 17

C. *Miranda* and its progeny provide both adequate protection for the Fifth Amendment privilege and meaningful deterrence. 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES **Page**

Baltimore City Dept. of Soc. Servs. v. Bouknight, 493 U.S. 549 (1990) 9

Berkemer v. McCarty, 468 U.S. 420 (1984) 19

Chavez v. Martinez, 123 S.Ct. 1994 (2003) . . . 17, 19

Colorado v. Connelly, 479 U.S. 157 (1986) . . . 6, 9, 10

Davis v. North Carolina, 384 U.S. 737 (1966) . . . 6, 20

Dickerson v. United States, 530 U.S. 428 (2000) . . . 13, 16, 19

Frazier v. Cupp, 394 U.S. 731 (1969) 10

Harris v. New York, 401 U.S. 222 (1971) 15

Michigan v. Mosley, 423 U.S. 96 (1975) 12

Michigan v. Tucker 417 U.S. 433 (1974) 20

Miranda v. Arizona, 384 U.S. 436 (1966) 13

Moran v. Burbine, 475 U.S. 412 (1986) 19

New Jersey v. Portash, 440 U.S. 450 (1979) 16

New York v. Quarles, 467 U.S. 649 (1984) . . 4, 6-9, 17

Oregon v. Elstad, 470 U.S. 298 (1985) . . . 1, 7, 10, 12-15, 19

Oregon v. Hass, 420 U.S. 714 (1975) 18

Pennsylvania v. Mimms, 434 U.S. 106 (1977) 6

Westover v. United States, 384 U.S. 436 (1966) . . 11, 12

SCHOLARLY AUTHORITIES

Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109 (1998) 19

Paul G. Cassell & Bret S. Hayman, *Police Interrogations in the 1990s*, 43 UCLA L. REV. 839 (1996) 19

Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000 (2001). 19

ARGUMENT

I. ENGAGING IN UNWARNED INTERROGATION IS LAWFUL.

Respondent grossly misstates the facts and the law in arguing that the circumstances of her arrest and interrogation, particularly the lack of warnings, rendered her initial unwarned statement actually involuntary – a claim that she did not make in the court below.

A. The investigating officer had good reasons to arrest and question respondent immediately after learning of her participation in the murder, and he did not act in "bad faith."

In characterizing Officer Hanrahan as acting "illegally," "improperly," or in "bad faith," respondent relies upon the faulty premise that any and all unwarned interrogation is "illegal." As detailed below, such questioning is not illegal; rather, under *Miranda* it is only presumptively coercive for purposes of determining the *admissibility* of unwarned statements. *Oregon v. Elstad*, 470 U.S. 298, 307 (1985). In various contexts, the Court has either condoned unwarned questioning or acknowledged that, standing alone, it does not violate the Constitution. *See* part III.A., *infra*. Here, the officer's actions were in no way improper. Officer Hanrahan was not circumventing *Miranda* or thumbing his nose at the Court's rules; rather, in good-faith reliance upon *Miranda* and its progeny, he used a technique that satisfied both the spirit and the letter of the Court's rulings. This case is not about any alleged villainy of Officer Hanrahan (or other forms of alleged illegality by officers' actions across the nation); rather, it is about the impact of his lawful actions in response to the unfolding tragedy and absolute horror of respondent's crime.

This is how the investigation actually unfolded.

After the murderous fire engulfed respondent's house and consumed the helpless Donald Rector and

the body of respondent's cerebral-palsy-stricken child, Officer Hanrahan and other local law enforcement officers went to work to solve the crime. Respondent's son, Darian Seibert, and respondent's intimate friend, Derrick Roper, had been injured in the fire, and Officer Hanrahan went to the local hospital where they had been sent for initial treatment. (J.A. 14; Tr. 765). It was there that Officer Hanrahan first met respondent. (J.A. 14-15, 41). Respondent approached Officer Hanrahan and asked "if everyone got out or if anybody was hurt," and he had the unpleasant task of informing her that two bodies were found in the burned-out trailer. (J.A. 15, 24-25, 41). At that time, Officer Hanrahan did not know that respondent (due to her participation in the crime) was already well aware that two bodies would be found. (J.A. 14-15, 24-25, 67-73).

On February 14, 1997, Officer Hanrahan talked to respondent again, this time at a hospital in St. Louis. (J.A. 15-17, 42). He told her about the evidence he had obtained and his "concerns that there may have been some foul play on the part of her son and Derrick." (J.A. 16). Respondent was still was not a suspect at that time (though she had not been "ruled out"). (J.A. 16, 26).

But two days later, the case started to break open. The evening of February 16, 1997, Officer Hanrahan had a conversation with Derrick Roper and another person who knew Roper. (J.A. 46). Information obtained during those interviews implicated respondent in the plan to burn down her trailer home and provided the probable cause necessary to arrest respondent. (J.A. 46). Once respondent's role in the fire and the murder of Donald Rector became clear, Officer Hanrahan set out to arrest her. (J.A. 46). The investigation was taking place in Rolla, Missouri (J.A. 14), approximately 100 miles from St. Louis. Before he could arrest respondent, he contacted a local prosecutor, made arrangements with St. Louis County to have respondent arrested, traveled to St. Louis, and met up with the arresting officer. (J.A. 17, 27, 51-52, 54). He finally arrived at the hospital in

St. Louis County, in the company of the arresting officer, and arrested respondent at about 3:00 a.m. (J.A. 26-27).

At this point, respondent misstates the record, demonstrating the danger of focusing on Officer Hanrahan's subjective intent. In an attempt to support her claim that "Hanrahan arrested [her] at a time and place that would maximize her grief and anxiety" (Resp. Br. 1), respondent argues that Officer Hanrahan "knew that Seibert was 'grief-stricken,'" that he arrested her at 3:00 a.m. "to ensure a more pliable suspect," and that he strategically increased the coercive effect of the stationhouse by "taking [her] away from dying Darian at 3:00 a.m., with Jonathan's funeral scheduled for the next day."[1] (Resp. Br. 30, 36). Finally, respondent makes the wholly unsupported assertion that the arrest occurred as it did because the "prosecutor and Hanrahan" were "frustrated that [respondent] did not implicate herself during previous informal questioning." (Resp. Br. 42).[2]

That is far from the truth. Officer Hanrahan no more "orchestrated" the arrest to "maximize [respondent's] grief" than he orchestrated the death, murder, and arson that gave rise to that "grief." As the evidence in this case shows, it was respondent who orchestrated the crime because she feared that she would be held responsible for the death of Jonathan, who was malnourished and had bedsores. It was respondent's consciousness of guilt that drove her to try to hide her child's untimely death, it was respondent's refusing to report Jonathan's death and prompting that led her son and her friend to burn

---

[1] Darian, of course did not die; he lived to be the state's principal witness against his mother at trial. (Tr. 849-875). Additionally, there is no evidence that, at the time of the arrest, Officer Hanrahan was aware of when Jonathan's funeral would take place.

[2] Officer Hanrahan could not have been "frustrated" with respondent for failing to incriminate herself earlier because she was not a suspect when those earlier conversations occurred.

down her home, it was respondent's plan that Rector would be sleeping when the fire was set, and it was respondent's twenty-dollar bill that paid for the gasoline can and gasoline that was used to such murderous and injurious ends. (J.A. 67-70; Tr. 795, 858-864, 874, 908; State's Exhibit 42). To suggest that Officer Hanrahan acted improperly in arresting respondent while she was "grieving" is outrageous. It shows a callous disregard for the seriousness of her crime and a lot of chutzpah.

In responding to unfolding events, Officer Hanrahan did not "orchestrate" the timing of the arrest. He had no control over the moment when Derrick Roper (or anyone else for that matter) would come forward with information that incriminated respondent – any more than, for example, the officer in *Quarles* had control over the moment when an apparent rape victim would come forward and identify her attacker. *See New York v. Quarles*, 467 U.S. 649, 651-652 (1984). There is no evidence that Officer Hanrahan delayed in making the arrangements for respondent's arrest and traveling to St. Louis. Once he learned that respondent was involved, it was his duty to track her down and make the arrest. He was not bound to arrange an arrest at a time more convenient for respondent, and it would little serve the public to require police to act only during normal business hours. The timing of the arrest speaks not to deviousness but to dedication. Officer Hanrahan did what any competent officer would have done: he promptly arrested an apparently dangerous criminal.

This was entirely lawful police conduct. Respondent claims that aside from subverting her free will, there was "no . . . reason" to arrest her and take her away from her "dying Darian" at 3:00 a.m. (Resp. Br. 29-30, 36). But in fact, there was. Reasonable officers know that when a conspiracy unravels, it becomes more likely that the conspirators will learn of their peril and attempt to evade justice by fleeing, obstructing justice, or taking more drastic measures, such as killing the other conspirators.

Here, any of these events was possible. Respondent was already in St. Louis, probably with some of her belongings; she had exhibited virtually no concern for the well being of her children; and she had arranged to have her home burned down just a few days earlier. She had little reason to maintain or return to her residence in Rolla, and she had ample reason to flee.

Then, when the investigation turned up information that respondent was involved in the murder, the underlying facts would have rung an ominous bell of warning in any reasonable officer's mind. Consider that respondent had apparently neglected her helpless, disabled child; that she had planned to cover up that death by burning down her own home; and that she had prevailed upon her own son to commit murder. Moreover, consider that respondent was, at the very time the investigation revealed her role in the murder, at the hospital with her seriously injured son, who was a potentially damning state's witness (which, in fact, he turned out to be). A reasonable officer confronted with these facts would have recognized – even if only instinctively – the dangerous possibilities of delay, and he would have done precisely as Officer Hanrahan did. Indeed, because respondent had shown no compunction about taking extreme, murderous measures to cover up what she now blithely claims was "likely" a death caused by medical complications (Resp. Br. 1), a reasonable officer could have easily concluded that respondent would harbor even less reluctance to cover up her active role in a murder. We will never know what might have happened if Officer Hanrahan had put off his sworn duties and delayed the arrest until a more convenient time.

Additionally, two people in respondent's household were already dead, and one was seriously injured. The full extent of the conspiracy was not known to law enforcement – there were multiple possible conspirators – and each unknown conspirator was a proverbial

loaded gun. Any well-trained officer under these circumstances could have reasonably concluded that immediate questioning was necessary and that the cost of *Miranda* warnings "would have been something more than merely the failure to obtain evidence useful in convicting" respondent. *See New York v. Quarles*, 467 U.S. at 657. Indeed, the cost to society could have been further injury to other victims, the injury or death of other conspirators, the destruction of evidence, and the expenditure of additional resources to investigate the case and bring the proper parties to justice. Moreover, once respondent was arrested, it made sense to immediately question her. If Officer Hanrahan had delayed the questioning for several hours, there may have been an argument that the longer detention had a coercive effect upon respondent. *See generally Davis v. North Carolina*, 384 U.S. 737, 752 (1966) (length of detention can affect voluntariness of a confession).

B. No decision of the Court makes the "reasonableness" of the officer's pre-warning actions the test for admitting a post-warning statement; but if the Court is inclined to define "improper tactics" as something other than actually coercive conduct, then the needs of legitimate law enforcement are relevant to the inquiry.

Respondent's extensive recitation of what she deems to be the facts is necessarily tied to her assertion that statements made in a post-warning interrogation are inadmissible if the officer was acting unreasonably by questioning before warning. (Resp. Br. 28-33). But that is not the rule – nor should it be.

Reasonableness lies at the heart of Fourth Amendment analysis. *See Pennsylvania v. Mimms*, 434 U.S. 106, 108-109 (1977). But "[t]he sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion." *Colorado v. Connelly*, 479 U.S.

157, 170 (1986). What respondent is really arguing, as suggested by the dissent in *Elstad*, 470 U.S. at 354-356, is that officers must justify any unwarned questioning.

In the Fifth Amendment context, the reasonableness of the officer's actions has been tied to admitting *unwarned* statements obtained under exigent circumstances. *See New York v. Quarles*, 467 U.S. at 656-657. However, when there are both unwarned and warned statements, and where the state seeks only to admit the warned statements, the rule of *Elstad* – which asks whether the officer engaged in actual coercion or other improper tactics that rendered the first statement involuntary – should control the inquiry. And *Elstad* made clear that the failure to give *Miranda* warnings alone is not an improper tactic. *See Oregon v. Elstad*, 470 U.S. at 343 (Brennan, J., dissenting) (recognizing that the majority implicitly held that failure to warn is not an "improper tactic[]"). If the Court is inclined to define "improper tactics" as something other than actually coercive conduct, the principles of legitimate law enforcement discussed in *Quarles* are relevant in determining whether a particular pre-warning interrogation tactic was so egregious as to be "improper."

Here, it was while the investigation was ongoing, that Officer Hanrahan arrested respondent and interrogated her. He undoubtedly had in mind the prosecutor's admonition to "make a case," but he also had the demands of public safety to consider. This was a complicated case of horrific dimensions, and there were multiple possible conspirators. Thus, while Officer Hanrahan obviously wanted respondent to give statements, it can be concluded, based upon the objective circumstances of the case, that he did not question her "solely to elicit testimonial evidence." *See New York v. Quarles*, 467 U.S. at 658-659.

As in *Quarles*, valid and objectively reasonable public-safety concerns justified Officer Hanrahan's

interrogating respondent without *Miranda* warnings. At the time of the questioning, the entent of the conspiracy was not known to the officers, and, as the record shows, the officers questioned respondent about the other people present in her home during the planning (J.A. 67-70, 72). It was objectively reasonable for the officer to question respondent in a way that was likely to yield information, *regardless of whether that information was later admissible at trial*, because there was an ongoing risk of further harm to society. Respondent claims that "[t]his is false," because in her view, Officer Hanrahan was only interested in blaming her for the crime. (Resp. Br. 43). But this claim ignores the objective circumstances of the case – where, as the conspiracy began to unravel, the conspirators began to point fingers at each other – and relies too much upon a simplistic view of the record. As stated in *Quarles*:

> In a kaleidoscopic situation such as the one confronting these officers, where spontaneity rather than adherence to a police manual is necessarily the order of the day, the application of the exception which we recognize today should not be made to depend on *post hoc* findings at a suppression hearing concerning the subjective motivation of the arresting officer. Undoubtedly most police officers, if placed in Officer Kraft's position, would act out of a host of different, instinctive, and largely unverifiable motives – their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect.

New York v. Quarles, 467 U.S. at 656 (footnote omitted). These observations are equally applicable in this case.[3]

---

[3] Admittedly, the spontaneity of the questioning in this case was less than that in *Quarles*; however, because petitioner is not arguing for the application of the public-safety exception, the need for spontaneity is considerably lessened. In *Quarles*, the prosecution actually admitted an unwarned statement; here, we seek to admit a statement obtained only *after Miranda* warnings were administered.

See also Baltimore City Dept. of Soc. Servs. v. Bouknight, 493 U.S. 549, 561 (1990) (where there was concern for the child's safety and the state had a regulatory interest in the child, the child's mother could not assert the Fifth Amendment privilege to avoid producing the child).

Moreover, it was neither improper nor unreasonable for Officer Hanrahan to fear that respondent might not make statements if first given the *Miranda* warnings. According to *Quarles*, this "fear" is entirely proper when confronted with circumstances that threaten the public:

> Whatever the motivation of individual officers in such a situation, we do not believe that the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety.
>
> * * *
>
> In such a situation, if the police are required to recite the familiar *Miranda* warnings before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding.

New York v. Quarles, 467 U.S. at 656-657. The same was true in the case at bar, and in some ways to a greater extent. In *Quarles* there was one suspect and one gun; here, there were multiple suspects and Officer Hanrahan did not know how many proverbial guns. It was objectively reasonable for him to seek information, so long as he did not resort to coercive conduct.

In short, it cannot be said that the early-morning arrest and unwarned interrogation were "improper tactics" that would except this case from *Elstad*. Merely interrogating respondent while she was "grieving" – even if accompanied by psychological interrogation tactics – did not render her statements involuntary. *See Colorado*

v. Connelly 479 U.S. at 164 ("a defendant's mental condition, by itself and apart from its relation to official coercion, should [not] ever dispose of the inquiry into constitutional 'voluntariness.'"); *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (the Court refused to find that a defendant who confesses after being falsely told that a codefendant has turned state's evidence, does so involuntarily). Nor should the Court presume, as the Missouri court did, that the officer's purpose was to overcome respondent's free will. As more fully set forth in petitioner's opening brief and discussed in part II.A., *infra*, the traditional indicia of coercion were largely absent from this case: the interrogation was short, and respondent was not held incommunicado (she made no request to speak to anyone), deprived of food, subjected to physical violence or threats of any kind, or subjected to any of the various "third degree" methods of interrogation. Nor were there promises made to induce her to speak. Those are the types of government conduct – the kind of over-reaching condemned in many cases – that must be present before it can be said that the officer's actions overbore the individual's will. *See Colorado v. Connelly*, 479 U.S. at 167, 170 (stating that "coercive police activity is a necessary predicate" to finding that a confession is involuntary and, quoting *Elstad*, stating that "the Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'").

II. RESPONDENT'S SECOND, WARNED STATEMENT WAS ADMISSIBLE UNDER EXISTING LAW, AND *MIRANDA*'S EXCLUSIONARY RULE SHOULD NOT BE EXPANDED TO DETER CONDUCT THAT IS NEITHER ILLEGAL NOR IMPROPER.

The *Elstad* rule asks first, whether the unwarned statement was actually coerced; and second (if the unwarned statement was not coerced), whether the warned statement was voluntary. *Oregon v. Elstad*, 470 U.S. at 309-311, 318. Respondent attempts to truncate

the case, arguing that *Elstad*'s rule never came into play because (a) the initial questioning was coercive, and (b) the post-warning interrogation "exploit[ed]" the prior, involuntary statement. (Resp. Br. 35). Neither the facts nor the law supports either claim.

A. The initial unwarned questioning was not actually coercive.

A finding that the initial questioning was actually coercive would, of course, have been dispositive under *Elstad*; however, the Missouri court did not go in that direction for one simple reason: the record demonstrates that the unwarned statement was voluntary.

Respondent attempts to fit her case into the taint-and-dissipation analysis of *Westover v. United States*, 384 U.S. 436 (1966). Indeed, respondent asserts that her case is "nearly identical" to *Westover*. (Resp. Br. 47). By quoting an incomplete phrase from the Missouri Supreme Court's opinion, she also suggests that the Missouri court concluded that her first statement was actually involuntary. (Resp. Br. 17, 37). But the Missouri court reached no such conclusion (Pet. App. A5-A9), and a review of the *Westover* case reveals why.

In *Miranda*, the Court's discussion of *Westover* was very brief, but the Court did note two salient facts: first, that the suspect was interrogated by police officers "at length" while in custody for fourteen hours; and second, that there had been no warnings. *Id.* at 494-496. He was then turned over to federal agents who continued to interrogate him without "an articulated waiver of rights." *Id.* at 496.[4] Admittedly, the Court stated generally that the four cases decided together in *Miranda* "might not" have involved coercion under the traditional standard;

---

[4] The brief for the United States also reflects that the federal authorities gave Westover warnings that would not have satisfied *Miranda*'s requirements. Brief for the United States at 9-10, *Westover v. United States*, 384 U.S. 436 (1966) (No. 761).

but, in discussing *Westover* specifically, the Court essentially concluded that the "prior statement" was actually coerced. *See id.* at 496-497 (confession was the result of "pressure" applied by local police officers in "compelling surroundings"). The Court's view of the initial interrogation in *Westover* was made clear in *Oregon v. Elstad*, 470 U.S. at 310, where the Court cited *Westover* as a case involving actual coercion. *See also Michigan v. Mosley*, 423 U.S. 96, 106-107 (1975) (describing the initial unwarned interrogation in *Westover* as "intense and prolonged"). Accordingly, in *Westover*, the Court refused to assume that Westover had intelligently waived his constitutional rights. *Westover v. United States*, 384 U.S. at 495-496.

It is no wonder, therefore, that respondent alone – and not the Missouri court or either amicus supporting respondent – cites *Westover*. Except as an example of what this case is not, *Westover* adds little substance to the discussion: respondent, unlike Westover, was not subjected to "intense and prolonged" unwarned interrogation; and respondent, unlike Westover, was fully and carefully advised of the *Miranda* warnings, and she affirmatively waived her rights before making her second statement. Thus, in every important respect, the salient facts of this case are "polar opposites" of the facts in *Westover*. Additionally, no recording apparently existed in *Westover*, but as proof of how the questioning occurred in this case, petitioner urges the Court to review the tape (State's Exhibit 42) and judge whether Officer Hanrahan compelled respondent to speak.

B. It is an unwarranted extension of *Miranda* to apply a "fruits" analysis to conduct that is not illegal, and, consequently, "exploitation" of an unwarned statement should only be improper if it is used to obtain a waiver.

Exploitation of an illegal act is one factor the Court may consider in applying the taint-and-dissipation

analysis of the "fruits" doctrine. But the lack of a constitutional or statutory violation should remove this case from the ambit of the "fruits" cases.

In *Miranda*, the Court provided enlarged protection for the Fifth Amendment by attaching a presumption of coercion to unwarned interrogation. *Oregon v. Elstad*, 470 U.S. at 307. It then applied the narrow exclusion provided for in the Fifth Amendment to such unwarned questioning, creating a rule of admissibility. *Miranda v. Arizona*, 384 U.S. 436, 476 (1966) ("The warnings required and the waiver necessary in accordance with our opinion today are . . . prerequisites to the *admissibility* of any statement made by a defendant.") (emphasis added). As the Court noted in *Dickerson*, *Miranda* is overexclusive in that it may exclude statements that are not involuntary and therefore do not run afoul of the Fifth Amendment. *Dickerson v. United States*, 530 U.S. 428, 444 (2000). But the Court concluded that overexclusion, while socially costly, is necessary to guard against the risk of undetected coercion. *Id.* at 442, 444. The Court has never applied a broad "fruits"-style exclusion to a *Miranda* violation because that would extend the already overexclusive *Miranda* rule beyond what is needed to protect the core guarantee of the Fifth Amendment. In *Dickerson* the Court declined to go beyond the holding of *Miranda* and implicitly upheld *Miranda*'s progeny, *id.* at 432, 442. But respondent would have the Court extend the fruits doctrine into *Miranda* and effectively eliminate *Miranda*'s progeny – particularly *Oregon v. Elstad*.

Under *Elstad*, "exploitation" of an unwarned statement is improper if it undermines a suspect's ability to make a knowing and voluntary waiver. *See Oregon v. Elstad*, 470 U.S. at 316. Consequently, the Court should not conclude that Officer Hanrahan's limited references to the unwarned statement affected the knowing and voluntary nature of respondent's waiver.

At the beginning of the second interrogation – *prior to any reference to the unwarned statement* – and after a fifteen- to twenty-minute break, Officer Hanrahan carefully and fully advised respondent of the *Miranda* warnings. (J.A. 58, 65-66). And it was no rote recitation. Point by point, Officer Hanrahan read each of the warnings to respondent and asked respondent to initial each one. (J.A. 19-20, 46-47, 65-66; State's Exhibits 37, 42). Nor was it a mere formalizing of what had gone before. Officer Hanrahan ascertained that respondent understood the warnings and that she wanted to make a statement. (J.A. 20, 46-47, 65-66). He did not by word, deed, or intonation downplay the importance of the warnings. (J.A. 19-20, 46-47, 65-66). In fact, by starting the tape recorder, solemnly administering the *Miranda* warnings, and executing a written waiver, Officer Hanrahan fully conveyed the gravity of the situation and scrupulously honored the demands of *Miranda*. Thus, as the record shows, respondent's waiver occurred before Officer Hanrahan made any reference to the unwarned statement, and, accordingly, in the absence of coercive conduct or "improper tactics," the warnings were fully effective in enabling respondent to make a valid waiver. *See Oregon v. Elstad*, 470 U.S. at 310-311, 316.

When Officer Hanrahan finally began the warned questioning, he said, "Ok, 'trice, we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?" (J.A. 66). This comment was introductory and did not mention the cat that had been let out of the bag. More importantly, however, this comment, like the tape recording itself, served a specific purpose: to make a record of the officers' dealings with respondent. Officer Hanrahan never hid the fact that he had engaged in a two-stage interrogation, and this first comment acknowledged that fact for the record.

The second reference came closer to mentioning an unwarned incriminating statement, but it stopped short

of that point. Officer Hanrahan merely said, "Now, in discussion you told us, you told us that there was a [sic] understanding about Donald." (J.A. 70).

The third reference to the unwarned statement occurred after respondent told Officer Hanrahan something that did not match what she had previously said. When respondent claimed not to have "thought about" Donald Rector's probable fate, Officer Hanrahan asked, "Trice, didn't you tell me that he was supposed to die in his sleep?" (J.A. 70). To this question, respondent stated that Rector was on new medication, and she then agreed that he was supposed to die in his sleep. (J.A. 70). The third reference was nothing more than Officer Hanrahan's clarifying what he thought respondent had said earlier. It was, therefore, analogous to impeaching a defendant with an unwarned statement – a practice the Court has specifically upheld. *See Harris v. New York*, 401 U.S. 222, 224-226 (1971).

Officer Hanrahan did not "exploit" the unwarned statement to obtain a waiver. Had he cajoled respondent into waiving her rights by telling her that silence would not avail her due to her previous statement, or had he confronted her with the previous statement upon her invocation of her right to remain silent, then it could be said that he "exploited" the unwarned statement.

Additionally, Officer Hanrahan's use of the unwarned statement did not render respondent's subsequent warned statement involuntary. The Court determined in *Elstad* that the "cat out of the bag" does not, in itself, render a subsequent warned statement involuntary. *Oregon v. Elstad*, 470 U.S. at 310-312. It naturally follows, therefore, that after a suspect executes a valid waiver and voluntarily chooses to make a second statement, referring to the suspect's guilty secret has no more coercive effect than the initial disclosure.

III. THE COURT SHOULD DECLINE RESPONDENT'S INVITATION TO EXPAND THE SCOPE OF *MIRANDA* AND EFFECTIVELY ELIMINATE *ELSTAD* AND *MIRANDA*'S OTHER PROGENY.

A. Respondent overreaches when she suggests that there is a blanket ban on pre-warning interrogation.

When respondent is not focusing on claims that cannot be justified by the facts, she overstates the law. Most notably, she argues repeatedly that pre-warning questioning always poisons post-warning answers. There is no such rule. Nor could there be without modifying a long line of precedents.

Respondent restates the question presented, and asserts therein that *Miranda* "constitutionally *requires* the giving of warnings at the outset of a custodial interrogation." (Resp. Br. i). There is, however, no constitutional or statutory *requirement* that warnings be given prior to any and every custodial interrogation. Respondent cites various instances where the Court has stated that warnings must precede custodial interrogation (Resp. Br 11-12), but those isolated references are not apposite and do not dictate the outcome here.

In the thirty-seven years since *Miranda*, the Court has made clear that *Miranda* announced a rule limiting the *admissibility* of unwarned statements in the prosecution's case in chief. *See Dickerson v. United States*, 530 U.S. at 443-444 (*Miranda*'s "core ruling [was] that unwarned statements may not be used as evidence in the prosecution's case in chief"); *Oregon v. Elstad*, 470 U.S. at 306-309 (the Court reduced the impact of *Miranda* when it recognized that simply withholding the warnings "should not breed the same irremediable consequences" as actual infringement of a constitutional right); *see also New Jersey v. Portash*, 440 U.S. 450, 459 (1979) ("compelled statements, as opposed to statements taken in violation of *Miranda*, may not be put to any

testimonial use whatever"). And even *Miranda*'s general rule is not absolute. *See New York v. Quarles*, 467 U.S. at 655-656 (creating a public-safety exception). In short, the Court has recognized that unwarned questioning alone does not violate the Constitution. *See Chavez v. Martinez*, 123 S.Ct. 1994, 2000-2002 (2003) (plurality opinion) ("[t]he text of the Self-Incrimination Clause simply cannot support the . . . view that the mere use of compulsive questioning, without more, violates the Constitution); *id.* at 2006-2007 (Souter, J., concurring in judgment) (rejecting claim that "questioning alone was a completed violation" of the Fifth Amendment); *id.* at 2013 (Kennedy, J., concurring in part and dissenting in part) (agreeing "that failure to give a *Miranda* warning does not, without more, establish a completed violation when the unwarned interrogation ensues").[5]

B. Respondent's "parade of horribles" has little to do with this case and does not justify an expansion of *Miranda* that would largely eliminate *Miranda*'s progeny.

Despite the apocalyptic tone of respondent's brief, this case will not determine the ultimate destruction or preservation of the Fifth Amendment privilege. In suggesting otherwise, respondent and amici in support of respondent cite numerous instances of alleged official misconduct, particularly in California, where officers have refused to honor a suspect's invocation of her rights. (Resp. Br. 19-23; Brief for the ACLU *et al.* at 9-23; Brief for Former Prosecutors, *et al.* at 19). Respondent cites three law review articles, each citing a litany of cases where officers have refused to honor suspects'

---

[5] Respondent cites the Missouri Attorney General's *Front Line Report* to assert that the Attorney General considers unwarned questioning "faulty." (Resp. Br. 2). But the purpose of the newsletter is to alert officers to judicial decisions and legislative changes. The description of this case therein reflects what the Missouri court held, not the Attorney General's opinion as to the propriety of the holding.

invoking their rights. (Resp. Br. 20). But that tactic is not at issue in this case, and, in any event, the Court has already laid down guiding principles to govern such cases. *See Oregon v. Hass*, 420 U.S. 714, 723 (1975) ("If, in a given case [where an officer refuses to honor an invocation], the officer's conduct amounts to abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness."). Similarly, the Court has laid down guiding principles in *Elstad* and *Quarles* for cases where an officer does not administer the *Miranda* warnings.

Consequently, the rhetoric aimed at Officer Hanrahan for his role in this case – the allegations of illegal actions and unreasonable conduct – is simply not warranted. Officer Hanrahan was not a rogue officer bent upon destroying respondent's ability to exercise her right to remain silent. He understood that unwarned statements were inadmissible, and before he sought admissible statements, he fully complied with *Miranda*, even taking the extra (and legally unnecessary) step of tape recording the second interrogation.

C. *Miranda* and its progeny provide both adequate protection for the Fifth Amendment privilege and meaningful deterrence.

Respondent portrays petitioner as seeking to overthrow the rule of *Miranda* (Resp. Br. 6, 8-9), but the reverse is true. Petitioner fully accepts the rule of *Miranda*, and petitioner, unlike respondent, is convinced that the *Miranda* warnings are strong enough and effective enough to meaningfully apprize a suspect in custody of her rights – even when, as discussed in *Elstad*, the suspect has previously made an unwarned statement. Petitioner is convinced that *Miranda* and its progeny are fully effective in maintaining the balance between protecting the individual and protecting "society's compelling interest in finding, convicting, and

punishing those who violate the law." *See Moran v. Burbine*, 475 U.S. 412, 426 (1986).

Since *Miranda*, the Court has recognized that the purpose of *Miranda* was not to "mold police conduct for its own sake." *Id.* at 425. To the extent that deterrence is a goal of *Miranda* and its progeny, it is deterrence of coercion – not deterrence of unwarned interrogation – that is paramount, and exclusion of the unwarned statement from the prosecution's case in chief is a sufficient remedy. The Court has said so repeatedly – in *Dickerson*, 530 U.S. at 443-444, in *Elstad*, 470 U.S. at 318, and most recently in Justice Kennedy's opinion in *Chavez*, 123 S.Ct. at 2013.

Indeed, as Professor Weisselberg – the author of one of the amicus briefs in support of respondent and of two of the law review articles cited in her brief – acknowledges, even if warnings are not viewed as mandatory in all situations, "*the police probably will still give the warnings* because if warnings are given and a suspect waives his or her rights, a court will admit at trial any resulting statement for all purposes." Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 153 (1998) (emphasis added). This observation is correct for several reasons. Officers generally question a suspect in the hope of acquiring admissible evidence of guilt, and, though statistics vary, it is clear that most suspects waive their rights and proceed to make statements.[6] In addition, as the Court has recognized, the giving of *Miranda* warnings benefits law enforcement as much as it does the individual. *See Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984) ("cases in which a defendant can make a colorable argument that a self-incriminating

---

[6] Paul G. Cassell & Bret S. Hayman, *Police Interrogations in the 1990s*, 43 UCLA L. REV. 839, 859-860 (1996) (roughly 80% of suspects waive their *Miranda* rights); Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1012 (2001) (78% - 96% of suspects waive after warnings).

statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare."); *Michigan v. Tucker* 417 U.S. 433, 443 (1974) (noting that the warnings "help police officers conduct interrogations without facing a continued risk that valuable evidence would be lost"). Moreover, an officer's choice *not* to give *Miranda* warnings prior to questioning becomes one factor, in the totality of the circumstances, that weighs against a finding of voluntariness. *See Davis v. North Carolina*, 384 U.S. at 740-741. These factors make the Court's current narrow exclusionary rule an adequate deterrent to pre-warning questioning.

CONCLUSION

The judgment of the Supreme Court of Missouri should be reversed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

KAREN K. MITCHELL
Chief Deputy Attorney General
Counsel of Record
JAMES R. LAYTON
State Solicitor
SHAUN J MACKELPRANG
KAREN P. HESS
Assistant Attorneys General
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-0774

Counsel for Petitioner

SUPREME COURT, U.S.
FILED
AUG 4 - 2003
CLERK

No. 02-1371

In the Supreme Court of the United States

STATE OF MISSOURI, PETITIONER

v.

PATRICE SEIBERT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record

CHRISTOPHER A. WRAY
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

IRVING L. GORNSTEIN
Assistant to the Solicitor General

JONATHAN L. MARCUS
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the holding of *Oregon* v. *Elstad*, 470 U.S. 298, 318 (1985), that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings" applies when the initial failure to give *Miranda* warnings was intentional.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	7
Argument:	
A police officer's intentional failure to give *Miranda* warnings before obtaining an incriminating statement from a suspect does not taint a subsequent warned statement	11
A. *Elstad* holds that a failure to provide *Miranda* warnings does not taint a subsequent warned statement	12
B. Subsequent cases confirm the validity of *Elstad's* holding	14
C. An officer's intentional withholding of *Miranda* warnings does not justify an exception to the rule established in *Elstad*	16
D. A deterrence rationale cannot justify a departure from the *Elstad* rule	18
E. There is no other basis for adopting an intent-based exception to the *Elstad* rule	24
Conclusion	28

TABLE OF AUTHORITIES

Cases:

Arizona v. *Fulminante*, 499 U.S. 279 (1991)	21
Berkemer v. *McCarty*, 468 U.S. 420 (1984)	20
Chavez v. *Martinez*, 123 S. Ct. 1994 (2003)	8, 14, 15, 17, 19
Colorado v. *Spring*, 479 U.S. 564 (1987)	20
Davis v. *North Carolina*, 384 U.S. 737 (1966)	20

Cases—Continued: Page

Dickerson v. *United States*, 530 U.S. 428 (2000) 6, 8, 14, 17, 19
Fellers v. *United States*, cert. granted, No. 02-6320 (Mar. 10, 2003) 2
Harris v. *New York*, 401 U.S. 222 (1971) 20, 27, 28
Massiah v. *United States*, 377 U.S. 201 (1964) 2
McNeil v. *Wisonsin*, 501 U.S. 171 (1991) 21-22
Michigan v. *Tucker*, 417 U.S. 443 (1974) 19
Miranda v. *Arizona*, 384 U.S. 436 (1966) 2, 3, 19
Moran v. *Burbine*, 475 U.S. 412 (1986) 17, 19, 21, 26
New York v. *Quarles*, 467 U.S. 649 (1984) 22, 23
Oregon v. *Elstad*, 470 U.S. 298 (1985) ..... *passim*
Oregon v. *Mathiason*, 429 U.S. 492 (1977) 22
Rhode Island v. *Innis*, 446 U.S. 291 (1980) 22
Stansbury v. *California*, 511 U.S. 318 (1994) 17, 22
State v. *Seibert*, No. 23729, 2002 WL 114804 (Mo. Ct. App. Jan. 30, 2002) 2, 4, 5, 6
United States v. *Esquilin*, 208 F.3d 315 (1st Cir. 2000) 1, 28
United States v. *Orso*, 266 F.3d 1030 (9th Cir. 2001), cert. denied, 123 S. Ct. 125 (2002) 1, 28
United States v. *Patane*, cert. granted, No. 02-1183 (Apr. 21, 2003) 2
United States v. *Washington*, 431 U.S. 181 (1977) 22

Constitution and statute:

U.S. Const.:
Amend. IV 12
Amend. V 8, 11, 13, 14, 16, 19, 21, 25, 27
42 U.S.C. 1983 ..... 8, 15

Miscellaneous:
DEA Agents Manual (2002) 21
FBI, Legal Handbook For Special Agents (1994) 21

In the Supreme Court of the United States

No. 02-1371

STATE OF MISSOURI, PETITIONER

v.

PATRICE SEIBERT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether a police officer's intentional failure to give *Miranda* warnings before obtaining a voluntary incriminating statement from a suspect precludes the introduction into evidence of a second statement made after *Miranda* warnings. The United States has a substantial interest in the question presented. First, the United States has an interest in introducing into evidence warned incriminating statements that are reliable evidence of guilt, regardless of whether individual federal agents or state officers may have deliberately withheld *Miranda* warnings in their initial questioning of the defendant. See *United States* v. *Orso*, 266 F.3d 1030 (9th Cir. 2001) (en banc), cert. denied, 123 S. Ct. 125 (2002); *United States* v. *Esquilin*, 208 F.3d 315 (1st Cir. 2000). Second, the

United States has an interest in introducing into evidence warned incriminating statements without becoming embroiled in collateral litigation over the mental state of particular federal or state agents who did not administer *Miranda* warnings in their initial questioning of the defendant.

Finally, the question presented in this case is related to the questions presented in two pending cases in which the United States is a party in this Court, *United States* v. *Patane*, No. 02-1183, and *Fellers* v. *United States*, No. 02-6320. *Patane* presents the question whether a failure to give a suspect the warnings prescribed by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), requires the suppression of physical evidence derived from the suspect's unwarned but voluntary statement. *Fellers* presents the question whether a second warned statement should be suppressed when a first statement was assertedly taken in violation of the rule in *Massiah* v. *United States*, 377 U.S. 201 (1964).

STATEMENT

Respondent was convicted of second-degree murder for her role in the death of Donald Rector. She was sentenced to life imprisonment. The Missouri Court of Appeals affirmed her conviction and sentence, *State* v. *Seibert*, No. 23729, 2002 WL 114804 (Mo. Ct. App. Jan. 30, 2002), but a divided Missouri Supreme Court reversed and remanded for a new trial, Pet. App. A1-A21.

1. Respondent Patrice Seibert lived with her five sons in a mobile home in Rolla, Missouri. Pet. App. A2. Donald Rector, a 17-year-old with a mental disorder, also lived with respondent. *Ibid.* On February 12, 1997, respondent's 12-year-old son Jonathan, who had a severe case of cerebral palsy, died in his sleep. *Ibid.*

Respondent did not report his death because she feared that, since Jonathan had bedsores, she would be accused of neglecting him. *Ibid.* That same day, in respondent's presence, two of respondent's teen-aged sons and two of her sons' friends discussed a plan to set fire to respondent's mobile home in order to cover up Jonathan's death. *Ibid.* The group decided that Donald Rector should be in the mobile home and die during the fire so that it would not appear that Jonathan had been left alone. *Ibid.* Respondent's oldest son Darian and his friend Derrick were to set the fire. *Ibid.*

With Darian present, Derrick set the fire. Pet. App. A2. Before doing so, Derrick hit Donald, who was having a seizure and convulsing on the floor in the mobile home. *Ibid.* Donald died of asphyxiation during the fire. *Id.* at A3. Respondent was not present when the fire was set. *Ibid.*

Five days later, Richard Hanrahan, a Rolla Police Officer, arranged for St. Louis County Officer Kevin Clinton to arrest respondent at a hospital where her son Darian was being treated for burns that he had suffered during the fire. Pet. App. A3. Hanrahan instructed Clinton not to give respondent the warnings specified by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Pet. App. A3. At approximately 3 a.m., Clinton woke up respondent and transported her to a police station, where Officer Hanrahan was waiting for her. *Ibid.* Officer Hanrahan decided to leave respondent alone in a small interview room for 15-20 minutes to "give her a little time to think about the situation." *Ibid.* After that interval, and without administering *Miranda* warnings, Hanrahan began to question respondent about her role in Donald's death. *Ibid.* Hanrahan questioned respondent for approximately 30-40 minutes. *Ibid.* During that period, Hanrahan squeezed respon-

dent's arm gently and repeated several times "Donald was also to die in his sleep." *Ibid.*; 5 Trial Tr. 937. His questioning did not involve threats, promises, or physical coercion. *Seibert*, 2002 WL 114804, at *4. Respondent eventually admitted that she knew Donald was to die during the fire. Pet. App. A3. After respondent made that admission, Officer Hanrahan gave respondent a 20-minute break for coffee and a cigarette. *Ibid.*

Hanrahan returned to question respondent again, and this time he recorded the conversation on tape. Pet. App. A3. Before resuming his questioning, Hanrahan administered *Miranda* warnings to respondent. *Ibid.* Respondent orally expressed her understanding of each of her *Miranda* rights and documented that understanding by initialing and signing a waiver form. *Id.* at A10 & n.4. After obtaining respondent's waiver, Officer Hanrahan began the second round of questioning by reminding respondent that they had previously discussed what had happened on February 12, 1997. *Id.* at A3. In response to a question about what was to happen to Donald during the fire, respondent stated that Donald was supposed to be taken out of the trailer. *Id.* at A4. That statement prompted Officer Hanrahan to say "didn't you tell me that he was supposed to die in his sleep?" *Id.* at A5. Respondent then admitted that Donald was supposed to die in his sleep. *Ibid.*

Respondent was charged with first-degree murder for her role in Donald's death. *Seibert*, 2002 WL 114804, at *2. Respondent sought to exclude both her unwarned and warned statements from the trial. At a pre-trial suppression hearing, Officer Hanrahan testified that he intentionally decided not to give *Miranda* warnings with the hope that he could obtain an admission of guilt which he could elicit again after providing the prescribed warnings. Pet. App. A4; 2/10/00 Hr'g Tr. 30-38. Officer Hanrahan further testified that he had received training from an institute that promoted that two-stage interview technique and that his current police department subscribed to that training program. Pet. App. A4. The trial court suppressed respondent's unwarned confession, but refused to suppress respondent's warned confession. *Seibert*, 2002 WL 114804, at *5. After a jury trial, respondent was convicted of second-degree murder and sentenced to life imprisonment. Pet. App. A1-A2.

2. The Missouri Court of Appeals affirmed, 2002 WL 114804, holding that the trial court had not erred in admitting respondent's warned confession. *Id.* at *5. Relying on *Oregon* v. *Elstad*, 470 U.S. 298 (1985), the court held that Officer Hanrahan's withholding of *Miranda* warnings before obtaining respondent's first confession did not taint respondent's subsequent warned confession. 2002 WL 114804, at *5-*7. The court explained that under *Elstad*, where an officer withholds *Miranda* warnings before obtaining a first statement but gives *Miranda* warnings before obtaining a second statement, the second statement is admissible, provided that it is voluntarily made. *Id.* at *5. The court rejected respondent's effort to distinguish *Elstad* on the ground that Officer Hanrahan deliberately withheld *Miranda* warnings before obtaining the first statement. The court explained that *Elstad*'s holding did not depend on this Court's evaluation of the officer's state of mind. Instead, the court stated, *Elstad* turned on this Court's conclusion that a failure to give *Miranda* warnings is not a constitutional violation and therefore does not trigger "fruit of the poisonous tree" analysis. *Elstad* also turned, the court said, on the

conclusion that the psychological impact on the suspect of having "let[] the cat out of the bag" does not make a second confession that was preceded by *Miranda* warnings involuntary. *Ibid.* The Missouri Court of Appeals reasoned that there is no "logical distinction" between an intentional and an inadvertent failure to give *Miranda* warnings, because in both cases the impact on the suspect is exactly the same. *Id.* at *7.

In a motion for rehearing or transfer to the Supreme Court of Missouri, respondent argued that *Dickerson* v. *United States*, 530 U.S. 428 (2000), had made clear that *Miranda* is a constitutionally based decision, and had thereby undermined *Elstad*'s holding that a failure to give *Miranda* warnings does not trigger the application of the "fruits of the poisonous tree" doctrine. 2002 WL 114804, at *9. The court of appeals rejected petitioner's argument and denied the motion. The court explained that *Dickerson* had given "tacit approval" to *Elstad*'s holding that "unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment." *Ibid.* (quoting *Dickerson*, 530 U.S. at 441).

3. The Supreme Court of Missouri granted respondent's motion to transfer and reversed. Pet. App. A1-A14. The court recognized that *Elstad* had held that a failure to give *Miranda* warnings before obtaining a first confession does not automatically taint a subsequent warned confession. *Id.* at A6-A7. The court distinguished *Elstad*, however, on the ground that *Elstad* did not involve an intentional decision not to give *Miranda* warnings. *Id.* at A12. The court viewed an intentional failure to give *Miranda* warnings as an improper tactic designed to undermine the suspect's ability to exercise his free will. *Id.* at A9. On that basis, the court concluded that where warnings are

intentionally withheld, only factors such as a lapse in time, a change in place, or a change in questioner can ensure that the second confession is voluntary; a recitation of *Miranda* warnings by itself is insufficient. *Id.* at A10-A11. Finding that Officer Hanrahan had withheld *Miranda* warnings intentionally when he first questioned respondent and that he had questioned respondent a second time within 20 minutes of the first confession in the same place, the court concluded that Hanrahan's "recitation of *Miranda* warnings" could not "resurrect the opportunity to obtain a voluntary waiver." *Id.* at A11. "To hold otherwise," the court concluded, "would encourage future *Miranda* violations" and sanction an "end run" around *Miranda*. *Id.* at A12.

Three judges dissented. They concluded that the majority had failed to follow this Court's binding holding in *Elstad* that uncoercive questioning without *Miranda* warnings does not taint a second warned and voluntary confession. Pet. App. A15-A26.

SUMMARY OF ARGUMENT

In *Oregon* v. *Elstad*, 470 U.S. 298 (1985), this Court held that when officers obtain a voluntary statement from a suspect without having administered *Miranda* warnings, and later obtain a second statement after having administered *Miranda* warnings, the second statement is admissible if it was knowing and voluntary. The Court rejected the proposition that the second statement must be suppressed as the fruit of the poisonous tree. It also rejected the view that the suspect, having let the "cat out of the bag" in the first statement, is disabled from making a knowing and voluntary second confession absent a passage of time or a break in the chain of events.

The holding of *Elstad* was approved by this Court in *Dickerson* v. *United States*, 530 U.S. 428 (2000). *Dickerson* reaffirmed *Miranda* and confirmed that it is a constitutional rule, but also made clear that *Elstad*'s refusal to apply the fruit-of-the-poisonous-tree analysis to unwarned questioning "simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment." 530 U.S. at 441. The Court's decision in *Chavez* v. *Martinez*, 123 S. Ct. 1994 (2003), refusing to allow a damages action under 42 U.S.C. 1983 for questioning without *Miranda* warnings, also supports the conclusion that there is no completed violation of the Constitution, and thus no basis for fruits analysis, simply because the police obtain a statement without having administered *Miranda* warnings. Both of those cases thus support the continued validity of *Elstad*.

The rationale of *Elstad* does not admit of an exception for cases in which a police officer's failure to administer *Miranda* warnings was intentional. First, *Elstad*'s conclusion that unwarned interrogation does not violate the Fifth Amendment, and thus does not support application of the fruit-of-the-poisonous-tree doctrine, is equally applicable whether the unwarned questioning was intentional or inadvertent. A failure to give *Miranda* warnings establishes only a presumption of compulsion; it does not mean that the statements were actually coerced. Interrogation without *Miranda* warnings also does not complete a constitutional violation; a completed violation can occur only when the unwarned statements are admitted at trial. Accordingly, the reasons why unwarned questioning, by itself, does not violate the Constitution are equally applicable whether the officer's failure to provide warnings was inadvertent or intentional.

Second, *Elstad* concluded that a suspect's provision of a first unwarned statement does not compromise his ability to make a knowing and voluntary decision to speak once he has been given *Miranda* warnings. That reasoning also applies whether the officer's failure to provide warnings was inadvertent or intentional. Unwarned questioning has the same effect on a suspect whether the officer's failure to warn was deliberate or the result of an oversight. And whatever the officer's motives in the initial questioning, the *Miranda* warnings provide the suspect with the information needed to make a voluntary decision to speak in response to later questioning.

In declining to apply *Elstad*, the Missouri Supreme Court relied largely on a deterrence rationale. It concluded that permitting the admission of voluntary warned statements, following intentional interrogation without warnings, would encourage officers to circumvent *Miranda*. That concern is unfounded. The Constitution does not forbid unwarned questioning, and courts should therefore not frame exclusionary rules to deter it. *Miranda* fully serves its purpose of protecting against the risk that a possibly coerced statement might be admitted at trial when unwarned statements are excluded from the government's case in chief.

Even if deterrence of unwarned questioning were a proper goal, there are already adequate incentives in place for officers to give *Miranda* warnings at the outset of custodial interrogation. The exclusion of unwarned statements from the government's case in chief provides a strong incentive to give *Miranda* warnings. An additional incentive flows from the fact that questioning without warnings increases the risk that any statements the suspect makes will be found involuntary, thus jeopardizing the admission of any

later confession. In contrast, if the officer furnishes *Miranda* warnings initially, there are few cases in which a defendant who speaks will be able to show that he did so involuntarily.

On the other side of the scales, the exclusion of a voluntary and warned confession deprives society of highly relevant and probative evidence, thus undermining the truthseeking function of a criminal trial and risking the acquittal of a guilty defendant. That cost outweighs any marginal deterrent effect. The Missouri Supreme Court's rule would also require courts to make difficult inquiries into the motives of particular officers who failed initially to give *Miranda* warnings. And a rule that sought to deter questioning without warnings overlooks that officers might appropriately question a suspect, without administering warnings, in some situations—such as when it might help locate a kidnapping victim, or thwart a terrorist attack. Officers should not have to hesitate before seeking such information because of the concern that the failure to give warnings at the outset might jeopardize the admission of a later warned and voluntary confession.

Finally, the Missouri Supreme Court's holding is not justified by *Elstad*'s limitation of its rule to cases involving neither actual coercion nor "circumstances that are calculated to undermine the suspect's ability to exercise free will." *Elstad*, 470 U.S. at 309. The quoted language in *Elstad* is another way of referring to police conduct that renders a confession involuntary. The central distinction drawn in *Elstad* is between practices that vitiate the voluntariness of a confession and the mere failure to provide the warnings specified by *Miranda*. When a first confession is rendered involuntary by coercive police conduct, this Court has considered factors such as a lapse in time and a break in

events to determine whether a second, warned statement is voluntary. But *Elstad* holds that such an analysis is not required when the first statement is simply unwarned. Creation of a new category of police practices—such as the intentional failure to give warnings—that falls short of coercion yet still may taint the voluntariness of a second statement, is not justified by Fifth Amendment principles. And the concern of the Missouri Supreme Court that an unwarned first confession lets the "cat out of the bag," and thereby vitiates the suspect's ability to make a knowing and voluntary waiver after receiving *Miranda* warnings, was rejected in *Elstad* itself. A defendant may make a knowing and voluntary decision to speak after receiving *Miranda* warnings; the officer's prior intentional elicitation of unwarned but voluntary statements does not invalidate that choice.

ARGUMENT

A POLICE OFFICER'S INTENTIONAL FAILURE TO GIVE *MIRANDA* WARNINGS BEFORE OBTAINING AN INCRIMINATING STATEMENT FROM A SUSPECT DOES NOT TAINT A SUBSEQUENT WARNED STATEMENT

The Missouri Supreme Court held that where an officer intentionally withholds *Miranda* warnings before obtaining a confession, that action, by itself, means that only factors such as a lapse in time, a change in place, or a change in questioner can ensure that a subsequent warned confession is voluntary. Pet. App. A10-A11. That holding conflicts with this Court's decision in *Oregon* v. *Elstad*, 470 U.S. 298 (1985), and constitutes an unjustifiable extension of this Court's decision in *Miranda*.

A. *Elstad* Holds That A Failure To Provide *Miranda* Warnings Does Not Taint A Subsequent Warned Statement

In *Elstad*, two police officers went to Elstad's house with a warrant for his arrest for burglary. Inside the living room, one officer asked Elstad whether he knew why the police had come to talk to him. Elstad admitted that he was at the scene of the burglary. Approximately one hour later, at police headquarters, an officer advised Elstad of his *Miranda* rights for the first time. Elstad waived his rights and confessed his involvement in the burglary. The trial court admitted Elstad's second confession into evidence, and Elstad was convicted. This Court found no error in the admission of the second confession, holding that a police officer's initial failure to administer *Miranda* warnings does not, without more, taint a subsequent warned confession. *Elstad*, 470 U.S. at 300-301.

In reaching that conclusion, the Court first rejected application of the fruit-of-the-poisonous-tree doctrine. Under that doctrine, a confession that is a product of a Fourth Amendment violation is excluded from the defendant's trial, unless intervening events break the causal link between the illegal conduct and the confession so that the confession is sufficiently an act of free will to purge the primary taint. *Elstad*, 470 U.S. at 306. The Court reasoned that the predicate for application of fruits analysis is a "constitutional violation," *id.* at 305, and "a simple failure to administer *Miranda* warnings is not in itself a violation of the Fifth Amendment." *Id.* at 306 n.1 The Court explained that while "[f]ailure to administer *Miranda* warnings creates a presumption of compulsion" that is "irrebuttable for purposes of the prosecution's case in chief," it "does not mean that the statements received have actually been coerced" within

the meaning of the Fifth Amendment. *Id.* at 307, 310. Accordingly, "the *Miranda* presumption * * * does not require that the statements and their fruits be discarded as inherently tainted." *Id.* at 307. Because a failure to administer *Miranda* warnings is not itself a constitutional violation, the Court concluded, where police obtain an unwarned confession, the admissibility of a subsequent confession does not depend on whether it is the fruit of the first, but on whether it is "knowingly and voluntarily made." *Id.* at 309.

The Court next rejected the Oregon state court's view that where police obtain an unwarned confession, only a lapse of time and change of place are sufficient to ensure that the suspect's waiver of rights and giving of a second statement were voluntary. The Court noted that when a prior confession is actually coerced, those factors are relevant in determining whether "that coercion has carried over into the second confession." 470 U.S. at 310. The Court concluded, however, that where the first confession is unwarned but voluntary, the situation is different. "In these circumstances, a careful and thorough administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible. The warning conveys the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an act of free will." *Id.* at 310-311 (internal quotation marks omitted). The Court noted that the Oregon state court's contrary conclusion was based on its view that, without a sufficient lapse of time, the psychological impact of having "let the cat out of the bag" renders the waiver and second statement involuntary. *Id.* at 311. The Court rejected that analysis, holding that the psychological impact of

having confessed once lacks significance under the Fifth Amendment. *Id.* at 311-314.

B. Subsequent Cases Confirm The Validity Of *Elstad*'s Holding

In *Dickerson* v. *United States*, 530 U.S. 428 (2000), the Court endorsed *Elstad*'s holding that a failure to administer *Miranda* warnings does not trigger "fruit of the poisonous tree" analysis. The Court explained that *Elstad*'s refusal to apply fruits analysis "simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment." *Id.* at 441.

Dickerson's approval of *Elstad* is fully consistent with its holding that *Miranda* is a constitutional decision. The constitutional rule of *Miranda* that *Dickerson* reaffirmed is not that the failure to give *Miranda* warnings itself violates the Constitution, but that "unwarned statements may not be used as evidence in the prosecution's case in chief." 530 U.S. at 443-444. As the *Dickerson* Court explained, "we need not go further than *Miranda* to decide this case. In *Miranda*, the Court noted that reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession, * * * a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt." *Id.* at 442. Accordingly, *Miranda* set forth "guidelines" for the "admissibility in evidence of any statement given during custodial interrogation." *Id.* at 435.

This Court's recent decision in *Chavez* v. *Martinez*, 123 S. Ct. 1994 (2003), confirms that the conduct of custodial interrogation without administering *Miranda* warnings is not itself a constitutional violation, and therefore does not trigger fruit-of-the-poisonous-tree

analysis. There, the Court held that a failure to administer *Miranda* warnings does not subject an officer to civil liability under 42 U.S.C. 1983. The four-Justice plurality opinion concluded that because *Miranda* establishes an "exclusionary rule" that is "prophylactic" and that is designed to prevent "the admission into evidence in criminal case[s] of confessions obtained through coercive custodial questioning," a "failure to read *Miranda* warnings * * * d[oes] not violate [a suspect's] constitutional rights." 123 S. Ct. at 2004 (plurality opinion). Justice Kennedy, joined by Justice Stevens, agreed with the plurality that "failure to give a *Miranda* warning does not, without more, establish a completed violation when the unwarned interrogation ensues." *Id.* at 2013. Instead, *Miranda* "mandates a rule of exclusion," and "[t]he exclusion of unwarned statements, when not within an exception, is a complete and sufficient remedy." *Ibid.*

Thus, *Elstad*'s holdings remain valid. When an officer fails to administer *Miranda* warnings before obtaining a confession, the admissibility of a subsequent warned confession does not depend on fruits analysis, but on whether the subsequent statement is knowing and voluntary. 470 U.S. at 304-309. Once *Miranda* warnings are given, "the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an act of free will." *Id.* at 311 (internal quotation marks omitted). A lapse of time and change of place are not necessary to ensure that the subsequent statement is voluntary. *Id.* at 311-312.

C. An Officer's Intentional Withholding Of *Miranda* Warnings Does Not Justify An Exception To The Rule Established In *Elstad*

The Missouri Supreme Court concluded that a different analysis applies when an officer deliberately withholds *Miranda* warnings before obtaining a confession. In that situation, the court concluded, an administration of *Miranda* warnings does not provide a sufficient guarantee that a subsequent statement is voluntary. Instead, only factors such as a lapse in time, a change in place, or a change in questioner can provide such a guarantee. Pet. App. A9-A11.

The reasoning of *Elstad* provides no support for the exception that the Missouri Supreme Court created. Although the opinion in *Elstad* referred to the officer's failure to give *Miranda* warnings in that case as an "oversight," 470 U.S. at 316, the officer's mental state was not critical to the Court's rationales. Instead, the rationales on which *Elstad* relied were that the initial taking of an unwarned, but voluntary, statement is not a constitutional violation, and that the suspect's giving of a voluntary statement in unwarned questioning does not taint the voluntariness of a second, warned statement. There is no logical distinction in those rationales between an intentional failure to give *Miranda* warnings and an oversight.

First, an intentional failure to deliver *Miranda* warnings, like an inadvertent one, is not itself a constitutional violation. The Fifth Amendment prohibits the admission of "compelled," or coerced, self-incrimination, and a failure to give *Miranda* warnings "does not *constitute* coercion." *Elstad*, 470 U.S. at 306-307 n.1. Instead, the failure to warn creates only a limited presumption of coercion in the government's case in chief. *Id.* at 306-307. In addition, under *Miranda*, a constitutional violation occurs only when an unwarned statement is admitted into evidence in the government's case in chief. *Dickerson*, 530 U.S. at 442, 444. The failure to give warnings, whether deliberate or inadvertent, does not itself complete a constitutional violation. *Chavez*, 123 S. Ct. at 2004 (plurality opinion); *id.* at 2013 (Kennedy, J., concurring). *Elstad* reasoned that a constitutional violation is a necessary predicate for application of fruit-of-the-poisonous-tree analysis. 470 U.S. at 305-306. Because a failure to give *Miranda* warnings is not itself a constitutional violation, that aspect of *Elstad*'s rationale applies equally whether the failure to warn is intentional or inadvertent.

Second, *Elstad* reasoned that, when the police obtain an unwarned but voluntary statement and then administer *Miranda* warnings, the warnings themselves provide the suspect with the necessary information to make a voluntary and intelligent determination whether to waive the privilege and speak. 470 U.S. at 311. The suspect's prior giving of an unwarned statement does not compromise his ability to waive his rights and make a subsequent voluntary statement. *Id.* at 312. The same reasoning applies whether the initial failure to give warnings was inadvertent or intentional. A suspect is affected by the methods that an officer uses to interrogate him, not by the officer's subjective mental state. See *Moran* v. *Burbine*, 475 U.S. 412, 423 (1986) ("[W]hether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights."); cf. *Stansbury* v. *California*, 511 U.S. 318, 323-325 (1994) (per curiam) (in determining whether a suspect is "in custody," subjective and undisclosed views of the officers are not relevant). If two officers interrogate a suspect, and one intentionally

withholds *Miranda* warnings while the other does so through an oversight, the impact on the suspect will be exactly the same. Furthermore, in both cases, a subsequent administration of *Miranda* warnings will have precisely the same effect. "The warning conveys the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an act of free will." *Elstad*, 470 U.S. at 310-311 (internal quotation marks omitted). There is therefore no basis for the Missouri Supreme Court's conclusion that an intentional withholding of *Miranda* warnings taints the voluntariness of a subsequent warned confession, even though withholding *Miranda* warnings through oversight does not.

D. A Deterrence Rationale Cannot Justify A Departure From The *Elstad* Rule

1. The Missouri Supreme Court based its decision in large part on a deterrence rationale. It perceived a need to deter the police practice of seeking an unwarned confession as a means of obtaining a subsequent warned confession. In the court's view, allowing the subsequent warned confession to be admitted into evidence in such circumstances "would encourage future *Miranda* violations" and sanction an "end run" around *Miranda*. Pet. App. A12.

Because the Constitution does not forbid the taking of unwarned statements, however, there is no warrant for a court to attempt to deter that practice. *Miranda*'s purposes are fully achieved when an unwarned confession is excluded from the government's case in chief. *Elstad*, 470 U.S. at 318 ("the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied * * * by barring use of the unwarned statement in the case in

chief"); *Chavez*, 123 S. Ct. at 2013 (Kennedy, J.) ("The exclusion of unwarned statements, when not within an exception, is a complete and sufficient remedy."). The admission of a subsequent statement that has been preceded by *Miranda* warnings and a valid waiver of rights, and that is otherwise knowing and voluntary within the meaning of the Fifth Amendment, manifests compliance with *Miranda*, not an "end run" around it.

Miranda itself does contain language that purports to establish rules for the conduct of the police. *E.g.*, 384 U.S. at 473-474. Some of this Court's later cases contain similar descriptions of the *Miranda* procedures, see, *e.g.*, *Moran*, 475 U.S. at 420 ("*Miranda* imposed on the police an obligation to follow certain procedures in their dealings with the accused."), and speak of assessing whether particular applications of the *Miranda* exclusionary rule would deter departures from those procedures, see, *e.g.*, *Michigan* v. *Tucker*, 417 U.S. 433, 447-448 (1974). But this Court's understanding of *Miranda* has evolved, and the rule's purpose, as properly understood, is to guard against the risk that *the courts* will erroneously admit a coerced confession; it is not to regulate out-of-court conduct by *the police*. See *Dickerson*, 530 U.S. at 442, 443-444; see also *Chavez*, *supra*. Accordingly, the taking of unwarned statements need not be deterred.

2. Even if deterring the police from failing to give *Miranda* warnings were a valid objective, the Missouri Supreme Court's rule would not be justified. Police officers already have incentives to give *Miranda* warnings, and the Missouri Supreme Court's rule would impose unjustified costs on the administration of justice. See *Elstad*, 470 U.S. at 312 (noting that suppressing a voluntary, warned statement that follows an unwarned statement would come "at a high cost to

legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being *compelled* to testify against himself").

The exclusion of an unwarned statement itself provides a significant incentive to give *Miranda* warnings. *Harris* v. *New York*, 401 U.S. 222, 225 (1971) ("sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief"). Police officers who engage in the practice at issue here also run the risk that their failure to give *Miranda* warnings, together with other evidence, might lead to a judicial finding that the first confession was coerced. *Davis* v. *North Carolina*, 384 U.S. 737, 740-741 (1966). In the event of such a finding, as explained in *Elstad*, the court would have to examine carefully such factors as lapse of time and change of place to decide whether the coercion "has carried over into the second confession," 470 U.S. at 310, which would jeopardize its admissibility. In contrast, officers who give *Miranda* warnings initially are likely to persuade courts that all the statements they have obtained are voluntary. As this Court has explained, "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Berkemer* v. *McCarty*, 468 U.S. 420, 433 n.20 (1984). "Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled." *Colorado* v. *Spring*, 479 U.S. 564, 576 (1987). Thus, police

officers already have a strong incentive to give *Miranda* warnings.[1]

Whatever additional deterrent effect could be achieved through the Missouri Supreme Court's rule cannot justify its costs to the administration of justice. "Admissions of guilt are more than merely desirable; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran*, 475 U.S. at 426 (citation and internal quotation marks omitted). Confessions that are made after *Miranda* warnings and that are found to be voluntary within the meaning of the Fifth Amendment are highly probative and reliable evidence of guilt. See *Arizona* v. *Fulminante*, 499 U.S. 279, 296 (1991) ("[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him."). Excluding such confessions interferes with the truthseeking function of criminal trials and runs a serious risk of permitting guilty defendants to go free. See *Elstad*, 470 U.S. at 312 (loss of "highly probative evidence of a voluntary confession" is a "high cost to legitimate law enforcement"); see also *McNeil* v. *Wisconsin*, 501 U.S. 171, 181 (1991) (the "ready ability

---

[1] Neither the Federal Bureau of Investigation nor the Drug Enforcement Agency has a practice of deliberately withholding *Miranda* warnings during initial custodial interrogation. According to FBI policy, "[p]rior to custodial interrogation, an accused is entitled to be warned of the right to remain silent and the right to an attorney at this critical stage of the criminal prosecution." *FBI, Legal Handbook For Special Agents* § 7-3.1 (1994). The Drug Enforcement Administration Agents Manual similarly provides that "[p]rior to interviewing any defendant, he/she must be advised of his/her constitutional rights." *DEA Agents Manual* § 6641.32 (2002).

to obtain uncoerced confessions is not an evil but an unmitigated good"); *United States* v. *Washington*, 431 U.S. 181, 187 (1977) ("far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable").

The Missouri Supreme Court's rule would also introduce an additional layer of litigation, fraught with the possibility for error, about the officer's intent. A court would have to probe the thought processes of police officers to decide whether they deliberately withheld warnings in order to facilitate a subsequent warned confession or whether they failed to give warnings for some other reason.

For example, *Miranda* applies only when the suspect is in custody, *Oregon* v. *Mathiason*, 429 U.S. 492 (1977) (per curiam); when the officer engages in interrogation, *Rhode Island* v. *Innis*, 446 U.S. 291 (1980); and when there is not a public safety justification for the questioning, *New York* v. *Quarles*, 467 U.S. 649 (1983). Each of those conditions for application of *Miranda* can raise difficult issues. Under this Court's cases, however, an objective standard is used to determine whether the requirements for application of *Miranda* have been met, which eases judicial administration of *Miranda* and provides workable guidance to police. *Stansbury*, 511 U.S. at 323-325 ("Our decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by * * * the interrogating officers."); *Innis*, 446 U.S. at 301 ("term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police * * * that the police should know are reasonably likely to elicit an incriminating response" without regard to "the underlying intent of

the police"); *Quarles*, 467 U.S. at 656 (the application of the public safety exception does not depend "on *post hoc* findings at a suppression hearing concerning the subjective motivation of the arresting officer"). The Missouri Supreme Court's rule would require a far more difficult and less reliable inquiry into whether officers genuinely believed that one or more of the predicates for *Miranda* warnings was not present, or whether they instead intended an "end run" around *Miranda*. Analysis would be further complicated by the likelihood that officers who fail to give *Miranda* warnings often do so for a mix of reasons.

This Court's decision in *Elstad* illustrates the difficulty of an inquiry into an officer's subjective motivation for failing to give *Miranda* warnings. There, the Court could only speculate that the officer who failed to give *Miranda* warnings in that case may have been uncertain whether the suspect was in custody or may have been reluctant to initiate an alarming police procedure before a different officer spoke to the suspect's mother. 470 U.S. at 315-316. Devoting judicial resources to the resolution of such difficult motive-based inquiries would needlessly complicate judicial decisions about the admissibility of confessions.

The Missouri Supreme Court's intent-based rule would have yet another undesirable effect. There can be entirely appropriate reasons for questioning someone without administering *Miranda* warnings. For example, when an officer seeks information in connection with a terrorism plot, or an officer seeks information to end an ongoing criminal activity such as kidnapping, officers may appropriately find it desirable to question a suspect without giving *Miranda* warnings. If an officer's subjective intent to omit *Miranda* warnings were deemed sufficient to taint a later warned

confession, officers might be deterred from conducting such inquiries for fear of jeopardizing the admissibility of a later warned confession.

E. There Is No Other Basis For Adopting An Intent-Based Exception To The *Elstad* Rule

In seeking to justify an intent-based exception to the *Elstad* rule, the Missouri Supreme Court quoted in part (Pet. App. A9) *Elstad*'s description of its rule as applying where a failure to administer warnings is "unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will." *Elstad*, 470 U.S. at 309. The Missouri Supreme Court regarded an officer's intentional failure to give *Miranda* warnings as a circumstance that is calculated to undermine the suspect's ability to exercise his free will within the meaning of *Elstad*, making *Elstad*'s general rule inapplicable. *Ibid.* The Missouri Supreme Court also quoted in part (Pet. App. A12) language from *Elstad* excepting from its rule cases where officers use "deliberately coercive or improper tactics" in eliciting the first confession, *Elstad*, 470 U.S. at 314, and concluded that an intentional failure to give warnings is an "improper tactic[]." In context, however, the references to "circumstances that are calculated to undermine the suspect's ability to exercise free will" and "improper" tactics are simply alternative ways of describing police practices that undermine voluntariness under the traditional due process inquiry. Because an intentional failure to give *Miranda* warnings does not by itself make a confession involuntary in the due process sense, *Elstad* provides no support for treating intentional failures to give *Miranda* warnings differently from inadvertent ones.

Several considerations support the conclusion that *Elstad* recognized an exception to its rule only for cases where police practices undermine voluntariness under a traditional due process analysis. First, that reading conforms to the *Elstad* Court's description of its holding: "We hold today that a suspect who has once responded to unwarned yet *uncoercive* questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." 470 U.S. at 318 (emphasis added). Second, throughout the opinion, the *Elstad* Court used disjunctive phrases similar to those above to describe the kind of circumstances that would render a confession involuntary under traditional due process analysis. 470 U.S. at 312 ("physical violence or other deliberate means calculated to break the suspect's will"); *id.* at 317 ("inherently coercive police tactics or methods offensive to due process that render the initial admission involuntary"). Third, that reading is consistent with the basic distinction *Elstad* drew between the analysis that applies when a first confession is actually coerced and the analysis that applies when a first confession is simply unwarned. *Id.* at 309-310. In the former situation, factors such as lapse of time and change of place are relevant in deciding whether a subsequent confession is voluntary. In the latter context, the delivery of *Miranda* warnings is an adequate antidote for what made the initial statement inadmissible. *Ibid.*

Finally, the Missouri Supreme Court's suggestion that the police officers in this case engaged in "improper conduct" under the Fifth Amendment when they intentionally failed to give *Miranda* warnings relies on the same "cat out of the bag" reasoning that this Court rejected in *Elstad*. The premise of the state court in *Elstad* was that there is "a subtle form of

lingering compulsion" that police officers exploit when the suspect feels "the psychological impact of [his] conviction that he has let the cat out of the bag and, in so doing, has sealed his own fate." 470 U.S. at 311. The Missouri Supreme Court relied on the same concern here in its reasoning that the unwarned interrogation "was intended to deprive [respondent] of the opportunity knowingly and intelligently to waive her *Miranda* rights." Pet. App. A12.[2]

In *Elstad*, however, the Court rejected the view that the giving of a voluntary but unwarned confession deprives a suspect of the ability to make a voluntary and intelligent waiver of *Miranda* rights. The Court noted that it "has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver." 470 U.S. at 312. The Court explained that "[t]here is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a 'guilty secret' freely given in response to an unwarned but non-

[2] The Missouri Supreme Court did not suggest that the *Miranda* warnings themselves were deficient, or that the police were required to supply any additional warnings to ensure that respondent's decision to waive her rights was knowing and voluntary. Any such suggestion would conflict with *Elstad*, where this Court rejected the view that an additional warning was required to ensure that Elstad's waiver of his rights was fully informed. 470 U.S. at 316. The Court reasoned that a requirement of an additional warning that the suspect's prior unwarned statement could not be used against him "is neither practicable nor constitutionally necessary." *Ibid.* See also *Moran*, 475 U.S. at 424-427 (declining to add to *Miranda* by requiring an additional warning that an attorney is seeking to contact the suspect).

coercive question." *Ibid.* That is because "[i]t is difficult to tell with certainty what motivates a suspect to speak," *id.* at 314, and a defendant's subjective beliefs about the consequences of giving a statement to the police have no relevance to the question whether his later, warned statements were voluntary. The suspect, having received *Miranda* warnings, can make a voluntary and knowing decision to speak. *Ibid.* ("A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights."). If a defendant's decision to let the cat out of the bag has no bearing on the voluntariness of a subsequent, warned statement, then an officer's subjective desire to induce the defendant to let the cat out of the bag, unaccompanied by coercive conduct, is an unjustified basis for creating a new Fifth Amendment rule that would exclude a subsequent warned and voluntary statement.[3]

[3] In *Elstad*, the Court noted that the "officers did not exploit the unwarned admission to pressure respondent into waiving his right to remain silent." 470 U.S. at 316. Similarly, in this case, Officer Hanrahan did not use respondent's unwarned statement to pressure her into waiving her right to remain silent. After respondent received *Miranda* warnings, she voluntarily waived her right to remain silent, and answered Officer Hanrahan's questions about the fire that resulted in Donald Rector's death, of her own free will. Nor did Officer Hanrahan engage in coercive tactics that undermined the voluntariness of respondent's subsequent warned statements. In response to one of Officer Hanrahan's questions, respondent asserted that Donald was to be taken out of the trailer. At that point, Officer Hanrahan referred to respondent's earlier

Accordingly, as two courts of appeals have concluded, there is no warrant for attributing to *Elstad* an intent to create an exception to its rule for cases where the officer's initial failure to administer *Miranda* warnings was deliberate. See *United States* v. *Orso*, 266 F.3d 1030, 1036-1037 (9th Cir. 2001) (en banc) ("the most persuasive reading of the 'improper tactics' passage is that the Court simply meant to connect such police conduct to the potential involuntariness of the unwarned statements."), cert. denied, 123 S. Ct. 125 (2002); *United States* v. *Esquilin*, 208 F.3d 315, 320 (1st Cir. 2000) ("If we read *Elstad* as a coherent whole, it follows that 'deliberately coercive or improper tactics' are not two distinct categories, * * * but simply alternative descriptions of the type of police conduct that may render a suspect's initial, unwarned statement involuntary."). The Missouri Supreme Court erred in seeking to derive from *Elstad* such an exception.

---

unwarned acknowledgement that Donald was to die in the fire. Respondent then admitted that Donald was to die in the fire. Pet. App. A4-A5. Officer Hanrahan's use of respondent's unwarned but voluntary admission that Donald was to die in the fire to question the truthfulness of respondent's assertion that Donald was to be taken out of the fire was entirely legitimate, cf. *Harris*, 401 U.S. at 225-226 (voluntary but unwarned statement may be used for impeachment), and did not impair the voluntariness of respondent's warned admission.

CONCLUSION

The judgment of the Supreme Court of Missouri should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
CHRISTOPHER A. WRAY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
IRVING L. GORNSTEIN
Assistant to the Solicitor General
JONATHAN L. MARCUS
Attorney

AUGUST 2003

Supreme Court, U.S.
FILED
OCT 8 2003
CLERK

(7)

No. 02-1371

IN THE

Supreme Court of the United States

STATE OF MISSOURI,

Petitioner,

v.

PATRICE SEIBERT,

Respondent.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF EASTERN MISSOURI, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

BEN WIZNER
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1616 Beverly Boulevard
Los Angeles, CA 90026

JONATHAN L. ABRAM*
E. DESMOND HOGAN
CHRISTOPHER T. HANDMAN
WILLIAM H. JOHNSON
KRISTIN K. COHEN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004
(202) 637-5681

* Counsel of Record

Counsel for Amici Curiae

(additional counsel listed on inside cover)

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

34 pp

Additional counsel:

LISA KEMLER
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
ZWERLING & KEMLER, P.C.
108 North Alfred Street
Alexandria, VA 22301

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. THE PRACTICE OF INTERROGATING SUSPECTS "OUTSIDE *MIRANDA*" HAS BECOME WIDESPREAD AND WILL CONTINUE TO GROW UNLESS THE COURTS EXCLUDE STATEMENTS AND EVIDENCE RESULTING FROM THE INTENTIONAL VIOLATION OF *MIRANDA*. 7

A. The Rules Surrounding *Miranda* Assume That The Police Will Obey This Court's Decisions 7

B. The Court's Assumption That The Police Will Comply With The Rules Articulated In *Miranda* And Its Progeny Has Proven Incorrect 9

C. The Experience Of The California Courts Illustrates That The Practice Of Going "Outside *Miranda*" Will Continue Unless The Court Puts A Stop To It 19

II. THE LEGITIMACY OF THIS COURT'S RULINGS WILL BE THREATENED IF THE POLICE ARE ALLOWED TO VIOLATE ESTABLISHED CONSTITUTIONAL RULES WITH IMPUNITY 23

CONCLUSION 28

TABLE OF AUTHORITIES

Page

Cases:

Brown v. *Illinois*, 422 U.S. 590 (1975) 10, 26

California Attorneys for Criminal Justice v. *Butts*, 195 F.3d 1039 (9th Cir. 1999), *cert. denied*, 530 U.S. 1261 (2000) 17

California v. *Peevy*, 953 P.2d 1212 (Cal.), *cert. denied*, 525 U.S. 1042 (1998) 19, 22

Chavez v. *Martinez*, 123 S. Ct. 1994 (2003) 2, 10, 15, 27

Cooper v. *Aaron*, 358 U.S. 1 (1958) 24, 25

Cooper v. *Dupnik*, 963 F.2d 1220 (9th Cir.), *cert. denied*, 506 U.S. 953 (1992) 16

Dickerson v. *United States*, 530 U.S. 428 (2000) ..... *passim*

Elkins v. *United States*, 364 U.S. 206 (1960) 26

Harris v. *New York*, 401 U.S. 222 (1971) 8, 9, 20

Henry v. *Kernan*, 197 F.3d 1021 (9th Cir. 1999), *cert. denied*, 528 U. S. 1198 (2000) 17

Mapp v. *Ohio*, 367 U.S. 643 (1961) 26

Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 23

McNabb v. *United States*, 318 U.S. 332 (1943) 26

Michigan v. *Harvey*, 494 U.S. 344 (1990) 25, 27

Michigan v. *Tucker*, 417 U.S. 433 (1974) 5, 8

Minnick v. *Mississippi*, 498 U.S. 146 (1990) 7

TABLE OF AUTHORITIES—Continued

Page

Miranda v. *Arizona*, 384 U.S. 436 (1966) ..... *passim*

Moran v. *Burbine*, 475 U.S. 412 (1986) 7

New York v. *Quarles*, 467 U.S. 649 (1984) 8

Oregon v. *Elstad*, 470 U.S. 298 (1985) 5, 8

Oregon v. *Hass*, 420 U.S. 714 (1975) 9

Rhode Island v. *Innis*, 446 U.S. 291 (1980) 7-8

Silverthorne Lumber Co. v. *United States*, 251 U.S. 385 (1920) 23

State v. *Knapp*, 666 N.W.2d 881 (Wis. 2003) 18

Sterling v. *Constantin*, 287 U.S. 378 (1932) 24

Constitution:

U.S. Const. art. VI, cl. 2 23

U.S. Const. amend. iv 10, 26

U.S. Const. amend. v ..... *passim*

U.S. Const. amend. xiv 12, 24

Rule:

S. Ct. Rule 37.6 1

TABLE OF AUTHORITIES—Continued

Page

Other Authorities:

Kimberley A. Crawford, *Intentional Violations of* Miranda*: A Strategy for Liability*, Texas Justice (Aug. 1997), at http://www.texas-justice.com/fbi/fbimiranda.htm (last visited Oct. 6, 2003)..... 10

Wanda J. DeMarzo & Daniel de Vise, *Spotlight on False Confessions: Zealous Grilling by Police Tainted 38 Murder Cases*, Miami Herald, Dec. 22, 2002, at http://www.truthinjustice.org/Spotlight-False-Confessions.htm (last visited Oct. 6, 2003)..... 18

Lawman Products Advanced Investigative Techniques Series, at http://lawmanproducts.com/page3.htm (last visited Oct. 6, 2003)..... 16

Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266 (Winter 1996)..... 16

Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 Minn. L. Rev. 397 (Dec. 1999)..... 11

Daniel McNerney, Deputy District Attorney, Orange County, Cal., *Miranda: Post-Invocation Questioning*, July 11, 1996, at http://www.cacj.org/policy_statements/policy_statement_12.htm (last visited Oct. 6, 2003)..... 21

TABLE OF AUTHORITIES—Continued

Page

Bernard C. Parks, Editorial (Apr. 20, 1998), at http://www.lapdonline.org/press_releases/editorials/1998/ed00003.htm (last visited Oct. 6, 2003)..... 14

Thomas D. Petrowski, Miranda *Revisited:* Dickerson *v.* United States, FBI Law Enforcement Bulletin: Aug. 2001, Vol. 70, No. 8, at http://www.fbi.gov/publications/leb/2001/august2001/aug01p29.htm (last visited Oct. 6, 2003)..... 11

Devallis Rutledge, *Questioning "Outside Miranda" Did You Know* * * *, Cal. Dist. Attorneys Ass'n, Sacramento, Cal. (June 1995)..... 12, 22

Elwood Earl Sanders, Jr., *Willful Violations of* Miranda*: Not a Speculative Possibility but an Established Fact*, 4 Fla. Coastal L.J. 29 (Fall 2002)..... 18

Michael P. Stone, General Counsel, *Ninth Circuit Holds Police May Be Sued for Intentionally Violating* Miranda, Legal Defense Trust Training Bulletin, at http://www.rcdsa.org/articles/miranda.htm (last visited Oct. 6, 2003)..... 15

Charles D. Weisselberg, *In the Stationhouse After* Dickerson, 99 Mich. L. Rev. 1121 (Mar. 2001)..... 19

Charles D. Weisselberg, *Saving Miranda*, 84 Cornell L. Rev. 109 (1998)..... 12, 14, 18

IN THE

Supreme Court of the United States

No. 02-1371

STATE OF MISSOURI,

Petitioner,

v.

PATRICE SEIBERT,

Respondent.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF EASTERN MISSOURI, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, non-partisan organization with over 400,000 members that has been engaged in defense of the Bill of Rights since 1920.[1] The ACLU of Eastern Missouri is

[1] All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than the amici, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6.

one of its affiliates. Many of the ACLU's efforts have focused on enforcing those portions of the Bill of Rights having to do with the administration of criminal justice, including participation as amicus curiae in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), *Dickerson* v. *United States*, 530 U.S. 428 (2000), and *Chavez* v. *Martinez*, 123 S. Ct. 1994 (2003).

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders, and law professors. Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice. NACDL has participated as amicus curiae in more than 30 cases before this Court, including numerous cases addressing *Miranda*. *See, e.g.*, *United States* v. *Patane*, No. 02-1183; *Dickerson*, 530 U.S. 428.

This brief will concentrate on the factual circumstances of custodial interrogations today, including the increasingly common police practice of questioning "outside *Miranda*"—a strategic method of interrogation that includes everything from intentionally withholding *Miranda* warnings to ignoring requests for counsel or invocations of the right to remain silent. Our brief will also discuss the threat to the integrity of this Court's role as the final arbiter of constitutional standards, and more generally to the rule of law, if this improper practice is allowed to continue without consequence. What was so in 1966 remains so today: If the Fifth Amendment privilege is to remain an effective guarantor of our accusatorial system of criminal justice, the right to remain silent during custodial interrogation must be protected, both by ensuring that warnings are provided to persons subjected to custodial interrogation and by requiring police to respect an individual's right to cut off questioning. Deliberate disregard

of *Miranda* severely undermines this Court's endeavor to establish concrete constitutional guidelines for law enforcement agencies to follow during the interrogation process, and tarnishes the integrity of our judicial process.

STATEMENT OF THE CASE

Based on a recorded statement made during a custodial interrogation, respondent Patrice Seibert was convicted of second-degree murder for her role in the death of Donald Rector in a fire in the mobile home where they both lived. *State* v. *Seibert*, 93 S.W.3d 700, 701 (Mo. 2002). The facts relevant to the issue before the Court are as follows.

Five days after the trailer fire, Officer Richard Hanrahan instructed his colleague to arrest Seibert. At the time of her arrest, she was sleeping in a hospital in St. Louis where her son was being treated for burns. When ordering the arrest, "Officer Hanrahan specifically instructed Officer Clinton not to advise Seibert of her *Miranda* rights." *Id.* at 702.

When Seibert arrived at the police station, she was confined in a small interview room alone for 15 to 20 minutes. Then, Officer Hanrahan entered the room and, without providing a *Miranda* warning, interrogated her for 30 to 40 minutes. During the interrogation, he repeatedly squeezed her arm and said "Donald [the victim] was also to die in his sleep." *Id.*

Eventually, Seibert conceded that the phrase Officer Hanrahan kept repeating was correct. Once she made this admission, Officer Hanrahan provided Seibert a cup of coffee and a cigarette. Twenty minutes later, he resumed his interrogation. This time, however, he advised Seibert of her *Miranda* rights, had her sign a waiver, and taped the conversation. *Id.*

When he began taping the interrogation, Officer Hanrahan referred to the unwarned portion of the interrogation: "OK, '[T]rice, we've been talking for a little while about what

happened on Wednesday the twelfth, haven't we?" *Id.* He then continued questioning Seibert, referring back to what she said during the unwarned portion of the interrogation, until he succeeded in getting her to "repeat[ ] statements she had made prior to receiving [the] *Miranda* [warnings]." *Id.*

Officer Hanrahan's subsequent testimony at trial made clear that "he [had] made a conscious decision to withhold *Miranda* hoping to get an admission of guilt." *Id.* Indeed, he was trained in and encouraged to use this interrogation tactic throughout his law enforcement career. Officer Hanrahan "testified that an institute, from which he has received interrogation training, has promoted this type of interrogation 'numerous times' and that his current department, as well as those he was with previously, all subscribe to this training." *Id.*

He employed this *Miranda*-evading interrogation technique and affirmatively linked together the pre-warning and post-warning portions of the interrogation, using Seibert's pre-warning admissions during the second stage of the interrogation:

> Officer Hanrahan: Now, in discussion you told us, you told us that there was an understanding about Donald. (Here, he is referring to the unwarned portion of the interview.)
>
> Seibert: Yes.
>
> Hanrahan: Did that take place earlier that morning (February 12, 1997)?
>
> Seibert: Yes.
>
> Hanrahan: Ok. And what was the understanding about Donald?
>
> Seibert: If they could get him out of the trailer, to take him out of the trailer.
>
> Hanrahan: And if they couldn't?

> Seibert: I, I never even thought about it. I just figured they would.
>
> Hanrahan: Trice, *didn't you tell me that he was supposed to die in his sleep*?
>
> Seibert: If that would happen, 'cause he was on that new medicine, you know. * * *
>
> Hanrahan: The Prozac? And it makes him sleepy. So he was supposed to die in his sleep?
>
> Seibert: Yes. [*Seibert*, 93 S.W.3d at 702-703 (parentheticals and emphases in original).]

In light of this colloquy, the Supreme Court of Missouri "presume[d] that the violation of *Miranda* was a tactic to elicit a confession and was used to weaken Seibert's ability to knowingly and voluntarily exercise her constitutional rights." *Id.* at 705. On that basis, it distinguished this Court's decisions in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), and *Oregon* v. *Elstad*, 470 U.S. 298 (1985). After noting the twin goals underlying *Miranda*—to "deter improper police conduct and * * * assure trustworthy evidence," *id.* at 703-04—the Supreme Court of Missouri then concluded that Seibert's conviction must be reversed. As the court explained:

> To hold otherwise would encourage future *Miranda* violations and, inevitably, *Miranda*'s role in protecting the privilege against self-incrimination would diminish. Were police able to use this "end run" around *Miranda* to secure the all-important "breakthrough" admission, the requirement of a warning would be meaningless. Officers would have no incentive to warn, knowing they could accomplish indirectly what they could not accomplish directly. [*Id.* at 706-707.]

SUMMARY OF ARGUMENT

Interrogations in which the police deliberately ignore the rule of *Miranda* v. *Arizona* are unconstitutional. This

Court's landmark decision in *Miranda* established fundamental constitutional rules that remain among the most widely recognized constitutional protections in our criminal justice system: that an individual must be advised of his right to counsel, that he must be warned about the peril of self-incrimination, and that the police must, in fact, honor an individual's request to remain silent or to speak with counsel.

Despite *Miranda*'s otherwise absolute commands, in the past 37 years, this Court has crafted a series of workable rules and limited exceptions that fully respect the legitimate needs of law enforcement. These narrow refinements to the *Miranda* rule, however, were all based on an important assumption: that the police would in good faith follow the bright-line rule of *Miranda*. Indeed, this Court has dismissed suggestions that the police would exploit exceptions to *Miranda* as "speculative."

Time and experience, however, now demonstrate that the Court's assumption of good faith was misplaced. Real-world experience reveals that today, police officers—including the one who interrogated the respondent in this case—are trained to flout the requirements of *Miranda* and routinely question suspects "outside *Miranda*," either by failing to give any warning, or by ignoring requests to remain silent or for counsel, or both. Indeed, a slew of police training materials (including instructions from district attorneys to officers), academic research, and reported cases confirm that police routinely and deliberately ignore the dictates of *Miranda*. These sources provide a disturbing glimpse into well-developed police practices aimed at making an end-run around the requirements of the Constitution.

These practices not only violate the individual's Fifth Amendment rights, but also undermine the rule of law and the authority of this Court as the ultimate arbiter of the Constitution. This Court has long held it will not allow governments and government officials to ignore its rulings

on what is required by the Constitution. So too here. This Court should not countenance the pervasive practice of deliberately violating *Miranda*. To hold otherwise would be to place the Court's imprimatur on illegal police actions.

ARGUMENT

I. THE PRACTICE OF INTERROGATING SUSPECTS "OUTSIDE *MIRANDA*" HAS BECOME WIDESPREAD AND WILL CONTINUE TO GROW UNLESS THE COURTS EXCLUDE STATEMENTS AND EVIDENCE RESULTING FROM THE INTENTIONAL VIOLATION OF *MIRANDA*.

A. The Rules Surrounding *Miranda* Assume That The Police Will Obey This Court's Decisions.

Nearly four decades ago, this Court recognized in *Miranda* that "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." 384 U.S. at 455. To protect the individual's Fifth Amendment right against self-incrimination in that inherently hostile environment, this Court then articulated "concrete constitutional guidelines for law enforcement agencies and courts to follow." *Id.* at 442. In no uncertain terms, the Court held: "*Prior to any questioning*, the person *must be warned* that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444 (emphases added). *See also Moran* v. *Burbine*, 475 U.S. 412, 420 (1986). This Court recently reaffirmed the central thrust of *Miranda* by emphasizing that "*Miranda requires* procedures that will warn a suspect in custody of his right to remain silent and which *will assure* the suspect that the exercise of that right will be honored." *Dickerson* v. *United States*, 530 U.S. at 442 (emphases added). Indeed, the strength of the *Miranda* rule "lies in the clarity of its command and the certainty of its application." *Minnick* v. *Mississippi*, 498 U.S. 146, 151

(1990); *see also Rhode Island* v. *Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring in judgment) ("The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures * * *.").

While recognizing the importance of *Miranda* to the operation of our criminal justice system, this Court has also placed limits on its scope and has occasionally recognized exceptions to *Miranda*'s exclusionary rule. For example, in *Harris* v. *New York*, 401 U.S. 222 (1971), the Court held that voluntary statements made before the *Miranda* warnings are given may be used to impeach a defendant, even though the statements may not be used in the prosecution's case-in-chief. *See also New York* v. *Quarles*, 467 U.S. 649 (1984) (recognizing public safety exception); *Michigan* v. *Tucker*, 417 U.S. 433 (1974) (permitting testimony of witness identified by defendant in statement given without *Miranda* warning). Later, in *Oregon* v. *Elstad*, this Court recognized another narrow exception to *Miranda*'s rule of exclusion, concluding that a suspect's post-warning statements were admissible despite the police officer's initial "simple failure to administer the warnings." 470 U.S. 298, 309 (1985).

With cases like *Elstad*, *Harris*, and *Quarles*, this Court gave police officers breathing room to do their job in good faith. *See Dickerson*, 530 U.S. at 443 ("If anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling * * *."). Given the nature of the *Miranda* violations at issue in those cases, the Court concluded that an overly strict exclusionary rule might hinder the search for "trustworthy evidence" without any offsetting benefits in terms of deterring improper police conduct. *See Elstad*, 470 U.S. at 308 (noting that trustworthy evidence and deterrence are twin goals of *Miranda* rule); *Tucker*, 417 U.S. at 445-446 (same).

In fashioning these narrow exceptions, this Court assumed that the police would not deliberately disregard the constitutional protections afforded by *Miranda*. For example, in *Harris*, while recognizing that statements made without the benefit of *Miranda* warnings could be used for purposes of impeachment, the majority dismissed as "speculative" the "possibility that impermissible police conduct [would] be encouraged." 401 U.S. at 225. Similarly, in *Oregon* v. *Hass*, the Court rejected as "speculative" the possibility that police might flout *Miranda* because they "may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeachment material." 420 U.S. 714, 723 (1975). And, in *Elstad*, the Court responded to Justice Brennan's description of the majority opinion as a "crippling blow" against *Miranda*, 470 U.S. at 358, by noting that the dissent's "apocalyptic tone * * * distorts the reasoning and holding of the decision," *id.* at 318 n.5, which permitted the use of post-warning statements after a preceding *Miranda* violation that the Court described as an "oversight." *Id.* at 316. As demonstrated below, however, it is no longer mere speculation that police are ignoring the mandates of this Court.

B. The Court's Assumption That The Police Will Comply With The Rules Articulated In *Miranda* And Its Progeny Has Proven Incorrect.

Real-world developments have demonstrated that what the Court once thought "speculative" has now become actual and pervasive. Questioning "outside *Miranda*" is standard operating procedure at many police departments across the country. Despite this Court's faith in law enforcement agencies to comply with *Miranda*, many police officers and departments have responded to the incentives created by this Court's decisions narrowing the scope of the *Miranda* exclusionary rule by deliberately disregarding *Miranda*. This response is based on a calculation that what is lost—the ability to use unwarned statements in the prosecution's direct

case—is often outweighed by what is gained—the ability to use unwarned statements as impeachment, or in hope they will lead to discovery of other evidence and witnesses, or, as here, to help induce later admissions. When this happens, the assumption of good faith compliance underlying *Miranda*'s careful balance between deterring improper police conduct and assuring "truthful evidence" is undermined. By deliberately withholding *Miranda* warnings from a suspect—or by ignoring the suspect's invocation of his "*Miranda* rights"—in an effort to obtain incriminating statements or evidence, police officers reduce the *Miranda* Court's commands to mere suggestions, to be followed only when nothing is to be gained by their breach. Under these circumstances, the vitality of *Miranda* as a constitutional rule demands exclusion. Even in *Elstad*, the Court carefully cabined its exception to *Miranda* by noting that the police would not be allowed to use "deliberately coercive or improper tactics in obtaining the initial [unwarned] statement." *Elstad*, 470 U.S. at 314; *cf. Brown* v. *Illinois*, 422 U.S. 590, 611 (1975) (Powell, J., concurring) (flagrant abuse of Fourth Amendment rights requires strict application of exclusionary rule).

As the ACLU explained in its amicus brief in *Chavez*, empirical evidence concerning commonly used custodial interrogation techniques provides alarming confirmation that the police abuse evident in this case has become commonplace. While disavowed by some law enforcement groups—notably the FBI—the technique of questioning "outside *Miranda*" is now routinely used by many police departments to obtain incriminating statements and valuable information from suspects.[2] Even the publications that discourage or

[2] *See* Kimberley A. Crawford, *Intentional Violations of* Miranda*: A Strategy for Liability*, Texas Justice (Aug. 1997), at 14-15 http://www.texas-justice.com/fbi/fbimiranda.htm (last visited Oct. 6, 2003). Recognizing that intentionally violating *Miranda* is a commonly used interrogation strategy, Crawford, an FBI Academy instructor, explains:

disavow the practice of questioning "outside *Miranda*" acknowledge that the problem is rampant.[3] And experts in interrogation strategies have suggested that the technique has only been refined over time.[4]

> [L]imitations on the effects of *Miranda* have encouraged some law enforcement officers to conclude that they have "little to lose and perhaps something to gain" by disregarding the *Miranda* rule. * * * Recognizing that the chances of obtaining incriminating information from counseled suspects are relatively remote, some law enforcement officers may choose to ignore invocations of the right to counsel and continue to interrogate suspects with the intention of gaining witness information or impeachment material. [*Id.* at 14-15.]

[3] *See* Thomas D. Petrowski, Miranda *Revisited:* Dickerson *v.* United States, FBI Law Enforcement Bulletin: Aug. 2001, Vol. 70, No. 8, at 29, at http://www.fbi.gov/publications/leb/2001/august2001/aug01p29.htm (last visited Oct. 6, 2003). On its website, the FBI describes the practice of questioning "outside *Miranda*," finding it so widespread as to warrant a warning to police departments against the practice:

> [P]ermissible uses of incriminating statements obtained in violation of *Miranda* have led to a practice in law enforcement of intentionally questioning in violation of *Miranda*. This practice is commonly referred to as questioning "outside *Miranda*." In fact, numerous law enforcement agencies have encouraged and provided training in this practice * * *.
>
> Departments must ensure that their officers do not interrogate "outside *Miranda*," and immediately abandon any condoned practice or policy of intentional violations of *Miranda*. * * * Departments must avoid even the appearance of intentionally conducting interrogations not in strict compliance with *Miranda*. [*Id.*]

[4] *See* Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 Minn. L. Rev. 397, 461 (Dec. 1999) (relying

Law enforcement officers throughout the country receive specific training in interrogating "outside *Miranda*"—similar to the training received by Officer Hanrahan—and learn the benefits of ignoring *Miranda*'s instructions. Training materials that teach police officers how to exploit the exceptions to *Miranda*'s exclusionary rule have been circulated widely to law enforcement officers throughout the country, and have been particularly prevalent in California.

For example, a training manual that the California Department of Justice issued to law enforcement instructors contains an entire section entitled "Statements Obtained Outside of Miranda." Charles D. Weisselberg, *Saving Miranda*, 84 Cornell L. Rev. 109, 134 (1998) (hereinafter "*Saving Miranda*"). The manual informs police officers of the benefits of ignoring *Miranda* and teaches that "[n]on-coercive" questioning in violation of *Miranda* does not violate a suspect's civil or Fifth Amendment rights and "is not itself unlawful." *Id.* The manual goes on to opine boldly that "[w]hile the courts can decide that police compliance with *Miranda* is prerequisite to confession admissibility, the courts have no authority to declare that non-compliance is 'unlawful,' nor to direct the manner in which police investigate crimes." *Id.*

A bulletin published by the California District Attorneys Association in 1995 sounded the same themes. *See* Devallis Rutledge, *Questioning "Outside* Miranda*" Did You Know* * * *, at 4 (Cal. Dist. Attorneys Ass'n, Sacramento, Cal. June 1995) (quoted in *Saving Miranda*, *supra*, at 133). In that bulletin officers were informed that "outside *Miranda*" questioning was not improper and that "[a]s long

---

on transcripts of interrogations to highlight two refinements to the "outside *Miranda*" technique: (i) using down-to-earth language to emphasize that the suspect's statements have no legal significance; and (ii) stressing to the suspect that talking "off the record" is in his or her best interests).

as officers avoid overbearing tactics that offend Fourteenth Amendment due process, the mere fact of deliberate non-compliance with *Miranda* does not affect admissibility for impeachment." *Id.* In short, the bulletin concluded that officers have "little to lose and perhaps something to gain" from going "outside *Miranda*." *Id.*

Similarly, widely disseminated police training videos teach officers about using the "outside *Miranda*" tactic. In one such video used by the Los Angeles Police Department, a deputy district attorney informed police officers:

> What if you've got a guy [in custody] that you've only got one shot at? This is it, it's now or never because you're gonna lose him—he's gonna bail out or a lawyer's on the way down there, or you're gonna have to take him over and give him over to some other officials—you're never gonna have another chance at this guy, this is it. And you Mirandize him and he invokes. What you can do—legally do—in that instance is go outside *Miranda* and continue to talk to him because you've got other legitimate purposes in talking to him other than obtaining an admission of guilt that can be used in his trial. * * *
>
> [Y]ou may want to go outside *Miranda* and get information to help you clear cases.* * *
>
> Or maybe it will help you recover a dead body or missing person. * * *
>
> You may be able to recover stolen property. * * *
>
> Maybe his statement "outside *Miranda*" will reveal methods—his methods of operation. * * *
>
> Maybe his statement will identify other criminals that are capering in your community. * * *
>
> Or, his statements might reveal the existence and location of physical evidence. You've got him, but you'd kinda like to have the gun that he used or the knife that he used. * * *

> [Y]ou go "outside *Miranda*" and take a statement and then he tells you where the stuff is, we can go and get all that evidence.
>
> And it forces the defendant to commit to a statement that will prevent him from pulling out some defense and using it at trial—that he's cooked up with some defense lawyer—that wasn't true. So if you get a statement "outside *Miranda*" and he tells you that he did it and how he did it or if he gives you a denial of some sort, he's tied to that, he is married to that. * * * [P]erfectly legitimate said both the California and U.S. Supreme Courts to use non-Mirandized statement[s] if they're otherwise voluntary. I mean we can't use them for any purpose if you beat them out of him, but if they're voluntary statements, * * * [we can] use them to impeach or rebut. So you see you've got all those legitimate purposes that could be served by statements taken "outside Miranda." [(quoted in *Saving Miranda*, *supra*, at 135-136).]

Police department officials have also endorsed the "outside *Miranda*" tactic on a number of occasions. For example, in 1998, Los Angeles Chief of Police Bernard C. Parks issued an "editorial" on the Los Angeles Police Department website indicating that the "outside *Miranda*" technique is permissible. *See* Bernard C. Parks, Editorial (Apr. 20, 1998), at http://www.lapdonline.org/press_releases/editorials/1998/ed00003.htm (last visited Oct. 6, 2003). Police Chief Parks recounted the many benefits of this approach, including the use of the suspect's statements for impeachment and several other benefits:

> Out of Miranda statements may be used as the basis for obtaining physical evidence; for other investigative purposes, such as locating contraband, locating the crime scene, identifying co-suspects, locating victims and witnesses, and clearing cases in order to re-prioritize investigative time; and putting to rest community fears. [*Id.*]

Obviously, the audience for Police Chief Parks' comments was primarily members of the Los Angeles Police Department.

Similarly, the general counsel for Riverside, California, explains in his Legal Defense Trust Training Bulletin the advantages of "the *trained* interrogation tactic of pressing the suspect after he invokes his right to silence and counsel." Michael P. Stone, General Counsel, *Ninth Circuit Holds Police May Be Sued for Intentionally Violating* Miranda, Legal Defense Trust Training Bulletin, at http://www.rcdsa.org/articles/miranda.htm (last visited Oct. 6, 2003) (emphasis in original). The bulletin describes the "typical scenario" as follows:

> In a custodial setting, a suspect says he wants a lawyer and does not want to talk. The interrogators expressly acknowledge that he has invoked his rights, and specifically note that, because of this invocation of rights, nothing that he says thereafter can be used against him, with or without the clarification, "in the case in chief." The interrogators go on to say that even though the suspect's statements "will not be used" against him, they are still interested in hearing what he has to say *before* he talks to a lawyer, because after consultation with a lawyer, they "won't trust or believe anything" he has to say. They may even offer to put it in writing that his statements "won't be used against" him. [*Id.*]

The bulletin, whose primary audience is members of the law enforcement community seeking guidance on legal issues, explains that the technique of going "outside *Miranda*" is often successful in obtaining statements that "guarantee that the suspect will never be able to testify in his own defense for fear of being impeached." *Id.* Only because of a then-recent Ninth Circuit case permitting § 1983 civil liability for a *Miranda* violation did the bulletin counsel against employing this technique. *Id.* Now, in light of this Court's decision in *Chavez*, the only factor which the bulle-

tin's author indicated impeded questioning "outside *Miranda*"—potential civil liability—has been removed.

Popular commercial training courses also promote the benefits of questioning in a way to avoid *Miranda*'s constraints. *See, e.g.*, Lawman Products Advanced Investigative Techniques Series, at http://lawmanproducts.com/page3.htm (last visited Oct. 6, 2003) (selling training courses that promise to "uncover[] the secrets of police interrogation," including lessons on how officers "can effectively question suspects without being hindered by *Miranda*," and "how the knowledgeable investigator can avoid being hindered by" a suspect's "constitutional rights").

Predictably, police officers have responded to their training concerning the benefits of ignoring this Court's instructions in *Miranda* and have actively employed the "outside *Miranda*" approach. According to one study, "detectives questioned suspects even after receiving an invocation" in nearly 20% of cases. *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266, 276 (Winter 1996). In these cases, the detectives informed the suspect that his statements could not be used against him in court and were just for information purposes, but "what the detectives knew and did not tell the suspect was that although the prosecution could not use such evidence as part of its case-in-chief, any information the suspect provided to the detective nevertheless could be used in a court of law to impeach the suspect's credibility, and indirectly incriminate the suspect if he chose to testify at trial." *Id.*

Evidence of the prevalence of this practice is also seen in the numerous cases addressing the propriety of "outside *Miranda*" questioning. The Ninth Circuit first confronted the "outside *Miranda*" tactic in *Cooper* v. *Dupnik*, 963 F.2d 1220 (9th Cir.) (en banc), *cert. denied*, 506 U.S. 953 (1992). In that case, a police task force had devised a strategy for interrogating suspects: the "core of their plan was to ignore

the suspect's Constitutional right to remain silent as well as any request he might make to speak with an attorney in connection therewith, to hold the suspect incommunicado, and to pressure and interrogate him until he confessed." *Id.* at 1224. In fact, one task force member testified, " '*You know, whether he asked for an attorney or for his mommy or whatever he asked for, if he asked to remain silent, I wasn't going to stop. We decided it was going to be very clear-cut, forget his* Miranda *rights, the hell with it.*' " *Id.* at 1226 (emphasis in original).

Seven years later, in *Henry* v. *Kernan*, 197 F.3d 1021 (9th Cir. 1999), *cert. denied*, 528 U.S. 1198 (2000), the Ninth Circuit overturned a murder conviction because law enforcement officials in Sacramento "set out in a deliberate course of action to violate *Miranda*," employing "slippery and illegal tactics * * * deliberately designed to undermine [the suspect's] ability to control the time at which the questioning occurred, the subjects discussed, and the duration of the interrogation." *Id.* at 1027, 1029. That same year, in *California Attorneys for Criminal Justice* v. *Butts*, 195 F.3d 1039 (9th Cir. 1999), *cert. denied*, 530 U.S. 1261 (2000), the Ninth Circuit again dealt with "a policy of the defendant police to defy the requirements of *Miranda* v. *Arizona*. * * * The alleged policy, set forth in certain training programs and materials, was to continue to interrogate suspects 'outside *Miranda*' despite the suspects' invocation of their right to remain silent and their requests for an attorney." *Id.* at 1041 (citation deleted).

These questionable interrogation tactics are not limited to California or to the Ninth Circuit. In perhaps the most in-depth nationwide study of "outside *Miranda*" techniques, Professor Charles D. Weisselberg uncovered decisions from 41 states in which police officers either continued questioning suspects after they had invoked their right to silence or to counsel, or questioned a suspect without giving *Miranda*

warnings at all. *See Saving Miranda*, *supra*, at 137-138.[5] In addition, recent decisions from other states reflect the widespread nature of the "outside *Miranda*" approach. For example, the Supreme Court of Wisconsin, in its recent decision in *State* v. *Knapp*, 666 N.W.2d 881 (Wisc. 2003), considered the admissibility of evidence where it was "undisputed that [the detective] intentionally violated [the defendant's] *Miranda* rights in order to procure derivative/physical evidence." *Id.* at 899. In light of the deterrence rationale underlying *Miranda*'s exclusionary rule, the court held that the physical fruits of such an intentional violation were inadmissible. *Id.* at 900.

And in the case now before the Court, Officer Hanrahan—a police detective in Rolla, Missouri—"testified that [he] made a conscious decision to withhold *Miranda* hoping to get an admission of guilt. *Seibert*, 93 S.W.3d at 702. He explained his interrogation approach:

> Basically, you're rolling the dice. You're doing a first stage where you understand that if you're told something that when you do read the *Miranda* rights, if they invoke them, you can't use what you were told. We were fully aware of that. We went forward with the second stage, read *Miranda* and she repeated the items she had told us. [*Id.* at 704.]

[5] *See also* Elwood Earl Sanders, Jr., *Willful Violations of* Miranda*: Not a Speculative Possibility but an Established Fact*, 4 Fla. Coastal L.J. 29, 37-55 (Fall 2002) (surveying the published opinions of 12 jurisdictions and identifying 41 instances in which law enforcement officers engaged in interrogation techniques that willfully and intentionally violated *Miranda*); Wanda J. DeMarzo & Daniel de Vise, *Spotlight on False Confessions: Zealous Grilling by Police Tainted 38 Murder Cases*, Miami Herald, Dec. 22, 2002, at http://www.truthinjustice.org/Spotlight-False-Confessions.htm (last visited Oct. 6, 2003) (explaining that Broward County, Florida homicide detectives repeatedly took confessions from suspects who had asked for attorneys or invoked their right to silence, and specifically citing murder suspect Pui Kei Wong, whose confession was thrown out because it was given after invoking his right to silence).

Officer Hanrahan testified that "an institute, from which he has received interrogation training, has promoted this type of interrogation 'numerous times' and that his current department, as well as those he was with previously, all subscribe to this training." *Id.* at 702.

As this evidence shows, law enforcement agencies and private training groups across the country view the *Miranda* warnings not as a constitutional safeguard, but as a legal speed bump to be avoided by exploiting the exceptions to *Miranda*'s exclusionary rule.

C. The Experience Of The California Courts Illustrates That The Practice Of Going "Outside *Miranda*" Will Continue Unless This Court Puts A Stop To It.

The experience of the California courts demonstrates that deliberate "outside *Miranda*" questioning by law enforcement will not be stopped by disapproval from the courts, unless that disapproval is backed by an exclusionary rule robust enough to remove the incentives for the practice. The California Supreme Court's repeated disapproval of such conduct, *see, e.g.*, *California* v. *Peevy*, 953 P.2d 1212, 1225 (Cal. 1998), *cert. denied*, 525 U.S. 1042 (1998) (noting that questioning outside *Miranda* amounts to "police misconduct"), had little effect on such police training. Indeed, a bulletin prepared by the Orange County California District Attorney's office following *Peevy* described the state high court's characterization of "outside *Miranda*" questioning as illegal as "unfortunate dictum" that would "be open to serious dispute if [it] should ever form the basis of a ruling." Charles D. Weisselberg, *In the Stationhouse After* Dickerson, 99 Mich. L. Rev. 1121, 1143-44 (Mar. 2001). The bulletin encouraged police to ignore the language of *Peevy* that

criticized "outside *Miranda*" questioning, continuing: "Meanwhile, like they say down home, 'If you've caught the fish, don't fret about losing the bait.' " *Id.*

Moreover, in one training video made by the Commission on Peace Officer Standards and Training (POST)—an agency within the California Department of Justice— police officers were brazenly instructed:

> [W]e on this program, or some of us in this program, have been encouraging you to continue to question a suspect after they've invoked their *Miranda* rights, and the reason we've encouraged you to do that [is] we want to lock them into their story now, so they can't change it later on, so they can't start shifting gears when they see how the evidence develops. * * *
>
> [O]ur job is getting harder with respect to obtaining information from a suspect after they've invoked their *Miranda* rights. I'm not telling you, "Stop questioning him after that." The law under *Harris* v. *New York*, and *People* v. *May* is what it is, and those are United States and California Supreme Court decisions, and we want to take advantage of that to the extent that we can, but we need to be mindful that some judges, in some recent cases have come out with language that severely frowns upon this practice, and are going to presume that that practice is eliciting involuntary statements. What that means is, that in addition to getting them to make additional statements, you also have to establish something that we can use as evidence that these statements were voluntarily made. So how do we do that? Somehow, if it can be done, you need to have the suspect to acknowledge a willingness to continue to speak even after he's invoked his *Miranda* rights.
>
> So for example, you read him his *Miranda* rights, and he invokes his right to silence. What can you do? You can ask him something like this: "Would it be O.K. if I continue to ask you a few questions about something related

> or even peripheral to the case?" Get him to acknowledge that it would be O.K. for you to continue to ask him those questions, or if he invokes his right to silence, you could say, "Lookit, would it be O.K. if I turn the tape recorder off?" or "Would it be O.K. if I had my partner step out of the room and just you and I talked just one-on-one." If after setting the criteria, he acknowledges a willingness to talk or to answer some of your questions, at least that puts something on the record that we have acknowledging that these additional statements that he's going to be giving are voluntarily made.
>
> What if he asks for an attorney? You could ask him something like, "Well, O.K., you have the right to an attorney, and since you asked for a lawyer, we're going to arrange to get you one. Now would it be O.K. if we continued to ask you some questions while we're arranging to get counsel here for you." If he says, "Yeah, just as long as I've asked for a lawyer, you tell me you're going to get me one, O.K., while we're waiting for the lawyer to get here, sure, I'll answer a few of your questions." Again, what you've done there is you put something on the record establishing a willingness on his part, voluntariness on his part to continue to engage in some kind of a dialogue." [Daniel McNerney, Deputy District Attorney, Orange County, Cal., "Miranda*: Post-Invocation Questioning*" (July 11, 1996), at http://www.cacj.org/policy_statements/policy_statement_12.htm (last visited Oct. 6, 2003).[6]]

---

[6] This video is currently available for sale as training material on POST's website. *See* POST Television Network Video Catalog (2001-02), at http://www.post.ca.gov/training/cptn/video_catalog.asp (last visited Oct. 6, 2003). Moreover, counsel for amici have copies of this and the other video broadcasts mentioned in this brief on file. Copies of these videos will be made available to the Court upon request.

And in another POST broadcast following the California Supreme Court's *Peevy* decision, a district attorney informed police of the court's disapproval of the practice of questioning "outside *Miranda*," but characterized that disapproval as "dicta" that was inconsistent with this Court's decisions. Devallis Rutledge, Deputy District Attorney, *Questioning "Outside* Miranda*" for Impeachment*, July 8, 1998, at http://www.cacj.org/policy_statements/policy_statement_12.htm (last visited Oct. 6, 2003). In light of *Peevy*, the district attorney suggested that police officers discuss the issue with legal counsel, but reminded them of the impeachment value of "outside *Miranda*" statements." *Id.*

In the wake of the unrelenting endorsement by some district attorneys and police trainers after *Peevy* and other similarly critical California Supreme Court cases, the tactic of going "outside *Miranda*" continued in California.[7] Finally, recognizing the ineffectiveness of its previous condemnations of the practice unaccompanied by real world consequences, the California Supreme Court recently reversed course in *People* v. *Neal*, 31 Cal. 4th 63 (Cal. 2003), concluding that "outside *Miranda*" statements, at least under the circumstances of that case, were involuntary and inadmissible for any purpose. *Id.* at 85. In a sharply-worded concurrence, Justice Baxter noted that "California courts have time and again noted and decried deliberate police use of tactics that violate *Miranda* standards" to no avail, and that "[i]t could not be clearer that efforts to gather court

[7] Several state legislators unsuccessfully attempted to stop the practice. The California State Senate passed a bill that would have prohibited law enforcement agencies from training officers to violate *Miranda*. *See* S.B. 1211, 2001-01 Reg. Sess. (Cal. 2001). However, the legislation was opposed by the California District Attorneys' Association, *see* Assembly Public Safety Committee Analysis (July 2, 2001), at http://info.sen.ca.gov/pub/01-02/bill/sen/sb_1201-1250/sb_1211_134918_asm_comm.html, and the bill failed to pass the California Assembly.

evidence by such means are improper." *Id.* at 90-91. Unless this Court responds similarly and excludes incriminating statements and evidence obtained after the deliberate use of "outside *Miranda*" questioning techniques, this practice will continue to spread, rendering *Miranda*, in effect, a dead letter.

II. THE LEGITIMACY OF THIS COURT'S RULINGS WILL BE THREATENED IF THE POLICE ARE ALLOWED TO IGNORE ESTABLISHED CONSTITUTIONAL RULES WITH IMPUNITY.

Allowing intentional violations of *Miranda*, like Officer Hanrahan's and the others described above, to go undeterred undermines the rule of law. Article VI of the Constitution makes clear that the Constitution itself is the "supreme Law of the Land." U.S. Const. art. VI, cl. 2. And since the time of *Marbury* v. *Madison*, this Court has recognized that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. (1 Cranch) 137, 197 (1803). This Court did just that in *Miranda* when it held that, in the custodial interrogation setting, a suspect must be permitted a full opportunity to exercise the privilege against self-incrimination guaranteed in the Fifth Amendment. 384 U.S. at 467. The Court concluded that the protection of this sacred privilege could only be accomplished if the suspect is "effectively apprised of his rights." *Id.* This Court found this warning necessary to ensure that "what was proclaimed in the Constitution had not become but a 'form of words.' " *Id.* at 444 (quoting *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920)).

In this case and many others, the police have intentionally chosen to ignore this Court's constitutionally mandated rule. As the Missouri Supreme Court observed, this "intentional omission of a *Miranda* warning was intended to deprive Seibert of the opportunity knowingly and intelligently to waive her *Miranda* rights." *Seibert*, 93 S.W.3d at 706. Were

this Court to sanction such an "end run" around *Miranda*—a rule this Court has held is necessary to protect the Fifth Amendment rights of a suspect—"the requirement of a warning would be meaningless." *Id.* at 707.

The authority of this Court will be undermined if police departments and officers are permitted to intentionally violate the constitutional requirements this Court has mandated to protect our Fifth Amendment rights.

When faced with a similar threat from the governor of Texas, who contended that the federal courts had no power to regulate his actions once he had declared martial law, this Court refused to acquiesce and abdicate its role as the final arbiter of the Constitution's requirements. *See Sterling* v. *Constantin*, 287 U.S. 378 (1932). Instead, the Court observed that, if the federal courts had no power to uphold the Constitution once a governor declared martial law, "the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the state may at any time disclose by the simple process of transferring powers of legislation to the Governor * * * upon his assertion of necessity." *Id.* at 397-398.

Unfortunately, the Court has had other occasions to reaffirm that its exposition of the law must be followed. In *Cooper* v. *Aaron*, 358 U.S. 1 (1958), the Little Rock School Board sought a suspension of the desegregation plan that was to be implemented in its school district. The School Board's position was that, because of the extreme public hostility to the plan caused by the actions of the state governor and legislature, desegregation was impossible. The Court denied the School Board's request, and concluded that its "interpretation of the Fourteenth Amendment enunciated * * * in the *Brown* case is the supreme law of the land." *Id.* at 18. The Court reasoned that, if state legislatures could, through their actions, "annul the judgments of the courts of the United States, and destroy the rights acquired under those judg-

ments, the constitution itself becomes a solemn mockery." *Id.* (internal quotation omitted). The Court in *Cooper* refused to permit the School Board to disregard the Court's ruling in *Brown*, based on the state's own actions in inciting the public hostility. Were the Court to permit states to ignore its determination of what is required to comply with and protect the Constitution, our system of laws would become meaningless.

Now, the Court once again faces demonstrable disregard of its decisions. Here, police around the country are purposefully disregarding *Miranda* for strategic purposes, knowing full well that they are violating the Court's constitutionally mandated requirement that suspects be apprised of their rights prior to a custodial interrogation. To allow evidence to be admitted that is the fruit of law enforcement's own illegal actions is to permit the police to ignore the letter and the spirit of this Court's *Miranda* decision.

Just as the Court refused to permit the Texas governor or the Little Rock school board to ignore its explication of the Constitution, so too it should refuse to permit police to flout the requirements of *Miranda*. That remains true despite police arguments that *Miranda* announced merely a "prophylactic rule." As Justice Stevens has observed, the "argument that a rule of law may be ignored, avoided, or manipulated simply because it is 'prophylactic' is nothing more than an argument against the rule of law itself." *Michigan* v. *Harvey*, 494 U.S. 344, 369 (1990) (Stevens, J., dissenting). Thus, just as the Court did not permit Congress to ignore its "prophylactic" *Miranda* decision by passing legislation purporting to overrule it, *see Dickerson*, 530 U.S. 428, so too it should not sanction the deliberate disregard of *Miranda* by prosecutors, police forces, and individual law enforcement officers.

The integrity of the federal judiciary generally, and this Court in particular, is profoundly threatened if police continue to "end run" the requirements in *Miranda*. To allow

that continued abuse would require the Court itself "to participate in, and in effect condone, the lawless activities of law enforcement officers." *Elkins* v. *United States*, 364 U.S. 206, 220 (1960) (internal quotation omitted). In *Elkins*, the Court concluded that evidence illegally seized by state agents in violation of a suspect's Fourth Amendment rights was inadmissible in a federal criminal trial, notwithstanding that federal officials had not been involved in the illegal search. The Court observed that "the imperative of judicial integrity" required that the Court disallow such evidence. *Id.* at 222. To rule such evidence admissible, the Court concluded, would make the courts "accomplices in the willful disobedience of a Constitution they are sworn to uphold." *Id.* at 223; *cf. McNabb* v. *United States*, 318 U.S. 332, 345 (1943) (concluding that a "conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law").

The Court reaffirmed this principle in *Mapp* v. *Ohio*, 367 U.S. 643 (1961). In holding that state courts are required to exclude evidence obtained through illegal searches and seizures, the Court noted that "the State, by admitting evidence unlawfully seized, serv[ed] to encourage disobedience to the Federal Constitution which it [wa]s bound to uphold." *Id.* at 657. In a similar context, where police deliberately ignored a defendant's Fourth Amendment rights, Justices Powell and Rehnquist concluded that "the deterrent value of the exclusionary rule is most likely to be effective and *the corresponding mandate to preserve judicial integrity* * * * most clearly demands that the fruit of official misconduct be denied." *Brown* v. *Illinois*, 422 U.S. at 611 (Powell, J., concurring) (emphasis added).

Similarly, law enforcement officials in this case deliberately disobeyed this Court's *Miranda* decision, despite their oath to uphold the Constitution and their duty to uphold the

constitutional rules enunciated by this Court. A decision by this Court permitting law enforcement to ignore *Miranda* without consequence would "undermine[] the principle that those who are entrusted with the power of government have the same duty to respect and obey the law as the ordinary citizen." *Michigan*, 494 U.S. at 369 (Stevens, J., dissenting). If evidence obtained as a result of such violations is admissible against a suspect, the Court itself will effectively have ratified the lawless actions of the police.

This concern is especially pressing in light of the Court's decision in *Chavez* v. *Martinez*, 123 S. Ct. 1994 (2003), that a suspect may not maintain a 42 U.S.C. § 1983 action against a police officer who violates *Miranda*. If questioning in violation of *Miranda* does not subject the officers or police departments to civil liability, then exclusion of evidence obtained that way is all the more critical. Otherwise, police officers will have no reason whatsoever to comply with this Court's mandate and will continue to flout *Miranda*. If the intentional violation of *Miranda* does not warrant the exclusion of the fruits of that violation, not only will the rights safeguarded by *Miranda* be in jeopardy, but so too will the authority and integrity of this Court.

CONCLUSION

For the foregoing reasons, as well as those presented in the respondent's brief, the judgment of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500

BEN WIZNER
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1616 Beverly Boulevard
Los Angeles, CA 90026
(213) 977-9500

LISA KEMLER
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
ZWERLING & KEMLER, P.C.
108 North Alfred Street
Alexandria, VA 22301
(703) 684-8000

JONATHAN L. ABRAM*
E. DESMOND HOGAN
CHRISTOPHER T. HANDMAN
WILLIAM H. JOHNSON
KRISTIN K. COHEN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004
(202) 637-5681

* Counsel of Record

Counsel for Amici Curiae

(8) No. 02-1371

Supreme Court, U.S.
FILED
OCT 8 - 2003
OFFICE OF THE CLERK

In The Supreme Court of the United States

STATE OF MISSOURI,

Petitioner,

v.

PATRICE SEIBERT,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Missouri

BRIEF *AMICI CURIAE* OF FORMER PROSECUTORS, JUDGES AND LAW ENFORCEMENT OFFICIALS, SUPPORTING RESPONDENT

CHARLES D. WEISSELBERG
University of California
School of Law (Boalt Hall)
Berkeley, CA 94720
Telephone: (510) 643-8159
Facsimile: (510) 642-3856

STEPHEN J. SCHULHOFER
KIRSTEN D. LEVINGSTON
FREDERICK A.O. SCHWARZ, JR.
TOM GERETY
Brennan Center for Justice
161 Avenue of the Americas
New York, NY 10013
Telephone: (212) 998-6260
Facsimile: (212) 995-4692

GEORGE A. CUMMING, JR.
Counsel of Record
MORGAN, LEWIS & BOCKIUS LLP
One Market, Spear Tower
San Francisco, CA 94105
Telephone: (415) 442-1198
Facsimile: (415) 442-1001

Attorneys for *Amici Curiae*

[Names Of Individual *Amici* Are Listed In The Appendix To This Brief]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

39 pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THE COURT SHOULD NOT OVERTURN *MIRANDA*'S PRE-INTERROGATION WARNING REQUIREMENT	5
A. *Miranda*'s Warning Requirement Applies to Law Enforcement and Promotes Effective Practices	5
B. Neither This Court's Exclusionary Rule Decisions Nor *Chavez v. Martinez* Displaces *Miranda*'s Affirmative Commands	12
C. The Court Should Disapprove the "Two-Stage" Interrogation Technique and Reaffirm that Warnings Must Be Given Prior to Interrogation	15
II. THE COURT SHOULD EXCLUDE EVIDENCE DERIVED FROM AN UNREASONABLE FAILURE TO ADMINISTER *MIRANDA* WARNINGS	20
A. Exclusion Is Appropriate and Necessary to Ensure that Officers Provide *Miranda* Warnings	20
B. A Rule Premised on Objective Good Faith Is Workable	24
CONCLUSION	30
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

CASES:

Berkemer v. McCarty, 468 U.S. 420 (1984) 8
Brown v. Illinois, 422 U.S. 590 (1975) 3, 27
Chavez v. Martinez, 123 S.Ct. 1994 (2003) ... 3, 12, 14, 15, 24
Colorado v. Spring, 479 U.S. 564 (1987) 25
Darwin v. Connecticut, 391 U.S. 346 (1968) 16, 28
Davis v. North Carolina, 384 U.S. 737 (1966) 8
Davis v. United States, 512 U.S. 452 (1994) 25
Dickerson v. United States, 530 U.S. 428 (2000) ..... *passim*
Duckworth v. Eagan, 492 U.S. 195 (1989) 6
Edwards v. Arizona, 451 U.S. 477 (1981) 21
Fare v. Michael C., 442 U.S. 707 (1979) 8
Harris v. New York, 401 U.S. 222 (1971) 3, 12, 14, 21
Hope v. Pelzer, 536 U.S. 730 (2002) 26
Illinois v. Perkins, 496 U.S. 292 (1990) 25
Kaupp v. Texas, 123 S.Ct. 1843 (2003) (per curiam) 27
Mapp v. Ohio, 367 U.S. 643 (1961) 22
Michigan v. Harvey, 494 U.S. 344 (1990) 13
Michigan v. Tucker, 417 U.S. 433 (1974) 8, 13, 14, 21
Miller v. Fenton, 474 U.S. 104 (1985) 8
Minnesota v. Murphy, 465 U.S. 420 (1984) 25
Minnick v. Mississippi, 498 U.S. 146 (1990) 21
Miranda v. Arizona, 384 U.S. 436 (1966) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Moran v. Burbine, 475 U.S. 412 (1986) 6
New York v. Quarles, 467 U.S. 649 (1984) 6, 16, 25, 26
Oregon v. Elstad, 470 U.S. 298 (1985) ..... *passim*
Oregon v. Hass, 420 U.S. 714 (1975) 13, 14
People v. Bradford, 929 P.2d 544 (Cal.), *cert. denied*, 522 U.S. 953 (1997) 22
People v. Neal, 72 P.3d 280 (Cal. 2003) 19
Rhode Island v. Innis, 446 U.S. 291 (1980) 5, 25, 26
Saucier v. Katz, 533 U.S. 194 (2001) 26
Stansbury v. California, 511 U.S. 318 (1994) 25, 26
State v. Knapp, 666 N.W.2d 881 (Wis. 2003) 22
State v. Kunkel, 404 N.W.2d 69 (Wis.), *cert. denied*, 484 U.S. 929 (1987) 17
State v. Provost, 490 N.W.2d 93 (Minn. 1992), *cert. denied*, 507 U.S. 929 (1993) 17
State v. Seibert, 93 S.W.3d 700 (Mo. 2002) ..... *passim*
Texas v. Cobb, 532 U.S. 162 (2001) 6
United States v. Bayer, 331 U.S. 532 (1947) 27
United States v. Khalil, 214 F.3d 111 (2d. Cir.), *cert. denied*, 531 U.S. 937 (2000) 17
United States v. Orso, 275 F.3d 1190 (9th Cir. 2001), *opns. respecting full court en banc reh'g, cert. denied*, 537 U.S. 828 (2002) 10
United States v. Orso, 266 F.3d 1030 (9th Cir. 2001) 22
United States v. Padilla, 819 F.2d 952 (10th Cir. 1987) 17

TABLE OF AUTHORITIES – Continued

Page

Wolf v. Colorado, 338 U.S. 25 (1948) 23

Wong Sun v. United States, 371 U.S. 471 (1963) 27

CONSTITUTIONS:

U.S. Const. amend. IV 22, 23, 27

U.S. Const. amend. V.....*passim*

U.S. Const. amend. XIV..... 8

STATUTES:

18 U.S.C. §3501.....6, 7

MISCELLANEOUS:

Bureau of Justice Assistance, U.S. Dep't of Justice, Understanding Community Policing: A Framework for Action (1994).....18

Sharon L. Davies, *The Penalty of Exclusion: A Price or Sanction?*, 73 S. Cal. L. Rev. 1275 (2000).....12

J. Edgar Hoover, *Civil Liberties and Law Enforcement; the Role of the FBI*, 37 Iowa L. Rev. 175 (1952).....11

Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 Minn. L. Rev. 387 (1999) 22

Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. Crim. L. and Criminology 621 (1996) 9

TABLE OF AUTHORITIES – Continued

Page

Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. Rev. 24 (1980).....22, 23

Office of the Missouri Attorney General, Front Line Report (March 2003), available at: http://www.ago.state.mo.us/032003fl.pdf 16

Charles D. Weisselberg, *In the Stationhouse after* Dickerson, 99 Mich. L. Rev. 1121 (2001).....22, 23

Charles D. Weisselberg, *Saving* Miranda, 84 Cornell L. Rev. 109 (1998).....22

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the former law enforcement officers, judges and prosecutors whose individual names appear in the Appendix to this Brief. Each dealt with *Miranda v. Arizona*, 384 U.S. 436 (1966), as an everyday reality during years of public service, and each remains actively interested in the fair and effective functioning of the criminal justice system.

This case is vitally important to society and to law enforcement professionals, for this Court has never before confronted the issues attending a lengthy custodial interrogation by an officer who knowingly and deliberately refused to warn a suspect "prior to *any* questioning," as required by *Miranda*.[2] Much less has this Court ever before dealt with a situation in which the officer "candidly admitted that he used a two-stage interrogation technique," taught at a "national institute," to "obtain respondent's [second] confession" intended for use in the State's case-in-chief. Petition for Writ of Certiorari ("Pet."), at 5. As the officer himself testified below:

> Basically, you're rolling the dice. You're doing a first stage where you understand that if you're told something that when you do read the *Miranda* rights, if they invoke them, you can't use what you were told. We were fully aware of that. We went forward with the second stage, read *Miranda*, and she repeated the items she had told us. (*State v. Seibert*, 93 S.W.3d 700, 704 (Mo. 2002)).

---

[1] This Brief is filed with the consent of Petitioner and Respondent. No counsel for any party authored this Brief in whole or in part, and no person or entity other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this Brief.

[2] *Miranda*, 384 U.S. at 444. All emphasis in materials quoted in this Brief has been added, unless otherwise stated.

According to the officer, his current department and those with which he had served previously, all subscribed to this training. *See id.* at 702.

We write to condemn this training and practice. We have worked within *Miranda*'s warning requirement on a daily basis and have found it not to be a barrier to effective law enforcement and prosecution. We urge the Court not to overrule a critical component of *Miranda* – that a suspect *must* be warned of his or her rights prior to custodial questioning. We believe that a statement should be excluded from evidence when it is derived from an objectively unreasonable failure to provide *Miranda* warnings.[3]

SUMMARY OF ARGUMENT

Just a few Terms ago, this Court firmly rejected a challenge to the constitutional status of *Miranda*. In *Dickerson v. United States*, 530 U.S. 428 (2000), the Court overturned a federal statute that would have permitted custodial interrogations without pre-interrogation warnings, and that would have measured the admissibility of suspects' statements in federal cases by the traditional totality-of-the-circumstances test for voluntariness. The Court ruled that the statute did not provide equally effective alternatives to *Miranda*'s protections. *See id.* at 441-42. If Congress could not pass a statute that dispenses with *Miranda*'s warning requirement, officers should not

[3] We note that another case before the Court, *United States v. Patane*, No. 02-1183, raises the question whether *Miranda*'s exclusionary rule includes derivative evidence in the absence of bad faith. Whatever the outcome in *Patane*, normal derivative evidence principles should apply when there is a bad faith or unreasonable failure to provide *Miranda* warnings. Although *amici* did not appear in *Patane*, where the filing deadline preceded that of this case, that fact should not be taken to signal any position on the issues presented in *Patane*, other than the views expressed here.

be permitted to disobey *Miranda*'s commands and achieve the same result.

Miranda establishes affirmative obligations for law enforcement, and the officer in this case was required to advise Respondent of her Fifth Amendment rights at the outset of the custodial interrogation. Nothing in this Court's exclusionary rule cases, such as *Harris v. New York*, 401 U.S. 222 (1971), or in the recent decision in *Chavez v. Martinez*, 123 S.Ct. 1994 (2003), indicates otherwise. *Harris* and its progeny (including *Oregon v. Elstad*, 470 U.S. 298 (1985)), assume that officers will continue to obey *Miranda*. Neither does *Chavez* in any way undermine the core holdings of *Miranda* and *Dickerson*.

We do not believe that there is any reason to revisit *Miranda* and *Dickerson* now. *Miranda* provides a number of significant benefits for law enforcement, which would be lost if *Miranda* warnings were made optional. Moreover, a decision tolerating the "two-stage" interrogation technique would erode the public's trust in law enforcement, and lead to disrespect for the law and its institutions.

The Court should deter officers from disobeying *Miranda* by excluding evidence derived from an objectively unreasonable violation of *Miranda*'s warning requirement. We believe that this exclusionary rule is manageable and is similar to the objective analysis required in other circumstances. If an unreasonable violation is found, normal attenuation principles, such as those set forth in *Brown v. Illinois*, 422 U.S. 590 (1975), would apply.

The facts here show the ease of applying such a rule, and the reasons why this case differs from others, including *Elstad*. An officer awoke the Respondent at 3:00 in the morning, as she slept beside her badly-burned son in his hospital room. She was placed under arrest. The arresting officer was instructed *not* to provide *Miranda* warnings. After Respondent was placed in a small interview room,

the lead investigating officer questioned her, without administering warnings. He squeezed her arm and repeated a statement aimed at showing her criminal intent throughout the interview. Respondent made incriminating statements. After a coffee break, the interrogation resumed. This time, the officer advised Respondent of her rights, and she signed a waiver form. During this "second stage" of the interrogation, the officer began by reminding her of her previous unwarned statement.[4] She again incriminated herself. *See State v. Seibert*, 93 S.W.3d at 702.

No reasonable officer could have doubted that Respondent was in custody and subject to interrogation; hence, warnings were required prior to any interrogation. The second statement was close in time to the first, and the officer repeatedly reminded Respondent of what she had said before.[5] Thus, there was not sufficient attenuation to purge the taint of the violation. Finally, the officer's misconduct, measured objectively, is sufficient to distinguish this case from *Elstad* and others, where officers made what could be considered a good faith *Miranda* mistake.

---

[4] He said, *"OK, 'Trice, we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?" Seibert*, 93 S.W. 3d at 702.

[5] *E.g., id.* at 702: *"Now, In discussion you told us, you told us that there was an understanding about Donald. * * * 'Trice, didn't you tell me that he was supposed to die in his sleep."*

ARGUMENT

I. THE COURT SHOULD NOT OVERTURN *MIRANDA*'S PRE-INTERROGATION WARNING REQUIREMENT

A. *Miranda*'s Warning Requirement Applies to Law Enforcement and Promotes Effective Practices

In the almost four decades since *Miranda* was announced, federal, state and local law enforcement officials have successfully investigated and prosecuted crimes within *Miranda*'s constitutional framework. Officers have become accustomed to providing the requisite warnings at the outset of a custodial interrogation. Guided by a large and settled body of decisional law, courts have routinely determined the admissibility of evidence based upon officers' adherence to *Miranda*'s requirements. While there were early questions about certain aspects of the *Miranda* rule, by 1980 Chief Justice Burger was able to declare with confidence that "[t]he meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures." *Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring); *Dickerson*, 530 U.S. at 443 (quoting *Innis*). One of the "reasonably clear" aspects of *Miranda* is that its rules apply directly to law enforcement. In our considered opinion, *Miranda*'s effectiveness depends upon the intent and ability of law enforcement agencies to adhere to that decision's "concrete constitutional guidelines." *Miranda*, 384 U.S. at 442; *Dickerson*, 530 U.S. at 435 (quoting *Miranda*). This case presents the knowing and deliberate failure to give pre-interrogation warnings, and so we focus on this particular requirement of *Miranda*. We note, however, that Petitioner's theory would make other requirements of *Miranda* optional as well. There would, for example, be no legal barrier to continuing to question custodial suspects

who have unequivocally asked for counsel for the purpose of obtaining a confession.

From the outset, law enforcement officials have understood that *Miranda*'s warning requirement applies directly to them. The Court declared in *Miranda*:

> [T]he following measures are *required*. Prior to *any* [custodial] questioning, the person *must* be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.

Id., 384 U.S. at 444. No reasonable interpretation of this language leaves any room to contend that the warnings are optional, not mandatory, or that they are anything other than binding upon police. While the Court has excused the need for warnings when there is a reasonable concern for the public safety (*see New York v. Quarles*, 467 U.S. 649 (1984)), the Court has otherwise only reaffirmed the mandatory, binding nature of the warning requirement. *See, e.g., Moran v. Burbine*, 475 U.S. 412, 420 (1986) ("*Miranda imposed* on the police *an obligation* to follow certain procedures in their dealings with the accused. In particular, *prior* to the initiation of questioning, they *must* fully apprise the suspect" of his Fifth Amendment rights.)[6]

Any uncertainty along this score must be considered settled after *Dickerson*. There this Court overturned a federal statute, 18 U.S.C. §3501, that would have

[6] *See also, e.g., Texas v. Cobb*, 532 U.S. 162, 171 (2001) ("[T]here can be no doubt" that a suspect "*must*" be given warnings "*before* authorities may conduct custodial interrogation."); *Duckworth v. Eagan*, 492 U.S. 195, 201 (1989) (*Miranda* "established certain procedural safeguards that *require* police to advise criminal suspects of their rights . . . *before* commencing custodial interrogation.").

supplanted *Miranda*'s procedures in federal cases. As the Court held,

> *Miranda requires procedures that will warn a suspect in custody of his right to remain silent* and which will assure the suspect that the exercise of that right will be honored. . . . §3501 explicitly eschews a requirement of pre-interrogation warnings in favor of an approach that looks to the administration of such warnings as only one factor in determining the voluntariness of a suspect's confession.

Dickerson, 530 U.S. at 442 (citing *Miranda*). The statute and other contemporary practices did not provide "an adequate substitute for the warnings required by *Miranda*." *Id.* Thus, §3501 was held unconstitutional. *Id.* at 444.

In the case at bench, Petitioner attempts to accomplish through disobedience what Congress could not achieve through legislation. If a statute passed by Congress was unconstitutional for lack of a pre-interrogation warning requirement, surely the Court ought not to place its imprimatur upon the purposeful decision of individual police officers to withhold these self-same warnings.

Dickerson firmly resolved prior suggestions that *Miranda* lacked constitutional footing. Further, the benefits of *Miranda* for law enforcement, the courts, and the accused – which were thoroughly briefed in *Dickerson*[7] and discussed in the Court's opinion – remain as important today as they were several Terms ago. We highlight just three benefits of *Miranda* that were identified in *Dickerson*, all of which are at risk here.

[7] *See, e.g.*, Brief of Griffin B. Bell, et al. As Amici Curiae In Support of Petitioner, *Dickerson v. United States*, No. 99-5525 (filed Jan. 27, 2000).

First, *Miranda* gives officers clear guidance as to the limits of appropriate behavior during a custodial interrogation. Prior to *Miranda*, officers' conduct was measured solely by the "totality-of-the-circumstances test" for voluntariness, which "is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner." *Dickerson*, 530 U.S. at 444 (citing *Haynes v. Washington*, 373 U.S. 503 (1963)). Voluntariness turns on "the techniques for extracting the statements" as well as "whether the defendant's will was in fact overborne." *Miller v. Fenton*, 474 U.S. 104, 116 (1985). Failure to administer *Miranda* warnings "is a significant factor" in the voluntariness analysis. *Davis v. North Carolina*, 384 U.S. 737, 740 (1966). That is why then-Justice Rehnquist wrote for the Court in *Michigan v. Tucker*, 417 U.S. 433, 443 (1974), that *Miranda* "help[s] police officers conduct interrogations without facing a continued risk that valuable evidence would be lost." *See also Fare v. Michael C.*, 442 U.S. 707, 718 (1979) ("*Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation. . . . ") Rather than be forced to predict how an uncertain, ever-shifting menu of circumstances may apply to a suspect and an interrogation, police may easily master a short litany that is effective in protecting the Fifth Amendment.

Second, when officers adhere to *Miranda*'s rules, the prosecution may altogether avoid litigation over whether an initial unwarned statement was coerced or compelled within the meaning of the Fifth or Fourteenth Amendments, and whether any subsequent statement should be excluded as a tainted product of the first. "[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984); *Dickerson*, 530 U.S. at 444

(quoting *Berkemer*). *Miranda* did not dispense with the voluntariness analysis, but pushed it from center stage. *See Dickerson*, 530 U.S. at 434. Under *Miranda*, courts apply simple, settled criteria in assessing whether law enforcement officers have respected a defendant's constitutional rights. Moreover, the certainty of the law in this area facilitates informed decision making by prosecutors and defense counsel as to whether a case should be tried or whether a ruling admitting a statement should be appealed. *Miranda* thus conserves resources by facilitating negotiated dispositions.

Third, "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture." *Dickerson*, 530 U.S. at 443. The *Dickerson* Court made this point to explain why principles of *stare decisis* weighed against overruling *Miranda*, but we think it is important to note for another reason as well. By becoming "embedded in routine police practice," *Miranda* has helped professionalize law enforcement. *Miranda* establishes uniform, nationwide standards that further training and the development of common practices across jurisdictions. Moreover, the warnings are important because of who gives them: when they administer *Miranda* warnings, law enforcement officers remind themselves as well as suspects of the appropriate limits of custodial interrogation. Further, *Miranda* promotes effective interrogation practices. Because *Miranda* is a uniform rule that permeates our culture, it is familiar to many suspects[8] and they may be put at ease.

None of these benefits of *Miranda* would long survive a ruling approving Missouri's "two-stage" interrogation

[8] *See, e.g.*, Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. Crim. L. and Criminology 621, 662-63 (1996).

technique or making *Miranda* warnings merely optional. As Judge Stephen Trott – a former state and federal prosecutor – has explained, the clear message to police trainers would be: "Don't advise, interrogate the suspect, violate the Constitution, use subtle and deceptive pressure, take advantage of the inherently coercive setting, and then, after the damage has been done, after the beachhead has been gained, gently advise the suspect of her rights." *United States v. Orso*, 275 F.3d 1190, 1197 (9th Cir. 2001) (Opn. of Trott, J., respecting denial of *sua sponte* call for full court *en banc* rehearing).

The United States argues that officers will still have an incentive to give warnings because of "the risk that their failure to give *Miranda* warnings, together with other evidence, might lead to a judicial finding that the first confession was coerced." Brief for the United States as Amicus Curiae ("U.S.Br."), at 20 (citing *Davis*, *supra*.) As the facts of this case, and the training of officers to avoid *Miranda*, demonstrate, the uncertain prospect that an unwarned statement or its fruits will be suppressed because it was involuntary is not sufficient to encourage law enforcement officers to provide pre-interrogation warnings. The United States itself made this point in *Dickerson*:

> Although many law enforcement agencies would continue to observe the *Miranda* procedures to help ensure the admissibility of confessions they obtain, it is likely that some police departments would become less rigorous in requiring warnings, others might significantly modify them, and some police officers would, in the "often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 14 (1948), fail to issue warnings at all before conducting custodial interrogation.

Brief for the United States, *Dickerson v. United States*, No. 99-5525 (filed Jan. 28, 2000), at 37. Thus, while some

professional law enforcement agencies might require their officers to give some form of pre-interrogation warnings (as the Federal Bureau of Investigations did prior to *Miranda*),[9] many others would not.

An immediate result would be the return to prominence of the Due Process Clause and the more difficult-to-apply voluntariness standard. When officers employ the "two-stage" interrogation technique, there will almost always be questions as to whether an initial unwarned statement was voluntary, and whether any subsequent statement was a tainted product of the first. Defendants will challenge the voluntariness of any later statement as well as the validity of any *Miranda* waiver that follows a belated set of warnings. Sanctioning the "two-stage" interrogation tactic will inevitably undermine the assumption made by most judges that post-warning statements are voluntary and that post-warning waivers have been properly obtained. As the United States previously explained to this Court, "[i]f *Miranda* warnings are not required, the result will be uncertainty for the police and an additional volume of litigation focusing on the totality-of-the-circumstances voluntariness standard." Brief for the United States, *Dickerson*, *supra*, at 37.

Miranda offers the principal set of bright-line rules for interrogators. Without its recognizable benchmarks, law enforcement officers may easily cross a constitutional line. Many statements would be ruled inadmissible and prosecutions lost. All of this would come at great cost to law enforcement, criminal defendants, the judicial system, and the public.

---

[9] *See* J. Edgar Hoover, *Civil Liberties and Law Enforcement; the Role of the FBI*, 37 Iowa L. Rev. 175, 177-182 (1952) (quoted approvingly in *Miranda*, 384 U.S. at 483-486).

B. Neither This Court's Exclusionary Rule Decisions Nor *Chavez v. Martinez* Displaces *Miranda*'s Affirmative Commands

Relying largely upon the plurality opinion in *Chavez v. Martinez*, and several exclusionary rule decisions that have allowed the limited use of evidence obtained through good-faith error, Petitioner argues that *Miranda* does not prevent law enforcement officers from questioning suspects without warnings. According to Petitioner, officers are free to conduct a "two-stage" interrogation, so long as the unwarned statement is not admitted in the case-in-chief and the subsequent statement is voluntary. *See* Brief for Petitioner ("Pet.Br."), at 11-17. Under this theory, *Miranda*'s exclusionary rule represents a value-neutral "price" for certain permissible modes of interrogation, rather than a "sanction" for prohibited conduct.[10] We urge the Court to reject these contentions and to denounce Missouri's "two-stage" interrogation tactic. Neither the exclusionary rule cases nor *Chavez* was meant to displace the holdings in *Dickerson* and *Miranda*, which require pre-interrogation warnings.

The first of the exclusionary rule decisions was *Harris v. New York*, holding that a statement elicited without *Miranda* warnings may be used for impeachment. That the officer acted in good faith in *Harris* is beyond question; the interrogation took place before *Miranda* was announced. *See id.*, 401 U.S. at 223. By permitting the statement to be used for impeachment, the Court plainly did not intend to promote unwarned interrogation. The majority brushed aside the "*speculative possibility* that

[10] *See* Sharon L. Davies, *The Penalty of Exclusion: A Price or Sanction?*, 73 S. Cal. L. Rev. 1275, 1282-1319 (2000) (describing these different views of *Miranda*'s exclusionary rule, and explaining why it is properly viewed as a "sanction," not a "price.").

impermissible police conduct [would] be encouraged" if the government is permitted even limited use of a statement taken in violation of *Miranda*. *Id.* at 225. *Harris* was followed by other decisions allowing the limited use of evidence gathered through unintended error. *See Michigan v. Tucker*, 417 U.S. 433, 435-37, 447 (1974) (interrogation pre-dated *Miranda*); *Oregon v. Hass*, 420 U.S. 714, 723 (1975) ("speculative possibility," citing *Harris*); *Michigan v. Harvey*, 494 U.S. 344, 351 (1990) (same).

Much the same is *Oregon v. Elstad*, in which an officer talked briefly with a suspect in his living room before taking him to the police station. *See id.*, 470 U.S. at 315. The Court permitted a second, warned statement into evidence but did not approve the officer's conduct. In her majority opinion, Justice O'Connor took pains to explain that the error was in good faith.[11] Citing *Tucker*, the Court noted that "the absence of any coercion or improper tactics undercuts the twin rationales – trustworthiness and deterrence – for a broader rule" of exclusion. *Elstad*, 470 U.S. at 308. *Tucker* holds that "[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct ... Where the official action was pursued in complete good faith, however, the deterrence rationale

[11] As the Court remarked:

> This breach may have been the result of confusion as to whether the brief exchange qualified as "custodial interrogation," or it may simply have reflected [Officer] Burke's reluctance to initiate an alarming police procedure before [Officer] McAllister had spoken with respondent's mother. Whatever the reasons for Burke's oversight, the incident had nothing of the earmarks of coercion. *See Rawlings v. Kentucky*, 448 U.S. 98, 109-110 (1980). Nor did the officers exploit the unwarned admission to pressure respondent into waiving his right to remain silent.

Id. at 315-16.

loses much of its force." *Id.*, 417 U.S. at 447. *Elstad* is thus premised on the officer's good faith; the decision in no way authorizes police to question without warnings. Indeed, *Elstad* itself emphasized that "[t]he Court today in no way retreats from the bright-line rule of *Miranda*." *Elstad*, 470 U.S. at 317.

This Court's decisions not to penalize the prosecution for an officer's reasonable *Miranda* mistake cannot be taken as approval of deliberate misconduct. *Harris*, *Hass*, *Tucker*, and *Elstad* represent examples of this Court's balancing of the relative harms to the government and the accused when an officer acts in objective good faith. These decisions reflect the Court's efforts to create measured exceptions to an otherwise remorseless *per se* rule of exclusion. The tempered language of *Tucker*, for example, certainly conveys no impression of vast "loopholes," and *Harris* positively dismisses this notion as "speculative." These cases cannot provide a green light for Missouri's "two-stage" technique. Any such claim runs directly counter to the express language of *Miranda* and *Dickerson*, which make clear that *Miranda* does indeed impose affirmative duties upon law enforcement officials.

Neither does last Term's decision in *Chavez* displace these principal holdings of *Dickerson* and *Miranda*. In *Chavez*, four members of this Court held that a plaintiff could not maintain a civil rights action premised on a Fifth Amendment violation because his statements had not been introduced against him in a criminal prosecution. *Id.*, 123 S.Ct. at 2000 (Thomas, J., joined by Rehnquist, O'Connor and Scalia, JJ.). No member of the Court sought to transform *Miranda*'s affirmative, protective commands into a rule prohibiting an officer's conduct only to the extent that such conduct violates the core of the Fifth Amendment. The plurality opinion acknowledges the validity of Court-created rules "designed to safeguard the core constitutional right protected by the Self-Incrimination Clause." *Id.* at 2003. Thus, "the 'procedural safeguards' *required* by

Miranda" protect and "provide practical reinforcement" for the Fifth Amendment privilege. *Id.* (quoting *Tucker*, 417 U.S. at 444). *See also id.* at 2006-07 (Souter, J., joined by Breyer, J.) (concurring in the Fifth Amendment result and noting that a series of decisions, including *Miranda*, have established protections for the privilege that may go further than the core of the Fifth Amendment).

Chavez exposes a Court sharply divided on the question of when a Fifth Amendment violation is complete, and whether one may seek a civil remedy for a violation if there has been no use of a statement in a criminal case. But *Chavez* does not reveal any hesitation or uncertainty about the core holdings of *Miranda* and *Dickerson*.

C. The Court Should Disapprove the "Two-Stage" Interrogation Technique and Reaffirm that Warnings Must Be Given Prior to Interrogation

The officer who interrogated Respondent was no blundering rookie, and neither was his "exchange" with Respondent "brief," "confused," or unexploited. *Compare Elstad*, 470 U.S. at 315-16. He was a veteran interrogator, seasoned by training at a "national institute," and he knew exactly what he was about and why. Employing the "two-stage" interrogation technique of his training, the officer deliberately questioned Respondent in violation of *Miranda*'s clear commands, and successfully obtained what some investigators would call a "beachhead" confession. Then, after belatedly admonishing Respondent of her "rights," the officer commenced the second "stage," coaching Respondent to repeat her words in successful pursuit of the second ("breakthrough") confession that the court below refused to sanctify. *See Seibert*, 93 S.W.3d at 702-03. The officer employed this tactic because it is effective. Everyone in law enforcement knows that the purpose of the "two-stage" technique is to soften up the suspect and

increase the likelihood that she will not invoke her rights once warnings are belatedly given. Justice Harlan stated this simple truth thirty-five years ago. The Office of the Missouri Attorney General acknowledged it as well in a recent publication, describing the training of the officer in this case. We may compare their two observations:

Justice Harlan:	Missouri Attorney General:
"A principal reason why a suspect might make a second or third confession is simply that, having already confessed once or twice, he might think he has little to lose by repetition."[12]	"The investigator . . . had been taught that suspects are more likely to confess the second time, even after *Miranda* warnings, once they have implicated themselves."[13]

There was no legitimate justification for this tactic. The State concedes that its officer did not withhold warnings because of any reasonable concern for the public safety, which under *Quarles* provides a recognized exception to *Miranda*. The Missouri Supreme Court found that the officer conducted a "two-stage" interrogation "in order to secure an admissible confession." *Seibert*, 93 S.W.3d at 703. The State here argues that it also sought a statement to "sort out the roles of the various conspirators and focus the investigation." Pet.Br., at 42. In our view, focusing the investigation and assessing the roles of co-defendants are appropriate though ordinary reasons to question a custodial suspect; they cannot establish the sort of emergency that would justify the purposeful failure to follow

[12] *Darwin v. Connecticut*, 391 U.S. 346, 350-51 (1968) (Harlan, J., concurring in part and dissenting in part).

[13] Office of the Missouri Attorney General, Front Line Report (March 2003), available at: http://www.ago.state.mo.us/032003fl.pdf (last visited Oct. 3, 2003).

Miranda.[14] Moreover, had the officer only sought information to focus the investigation or for use against others, he could have stopped after receiving the initial unwarned statement. Instead, he advised Respondent of her rights and prompted her to repeat her earlier statement, with the purpose of obtaining evidence that would be admissible against Respondent in the prosecution's case-in-chief at trial, precisely as he had been trained to do.

The United States suggests that there may be other desirable reasons to withhold *Miranda* warnings, such as "when an officer seeks information in connection with a terrorism plot," or when an officer needs information to end an "ongoing criminal activity such as kidnapping." U.S.Br., at 23. Existing law already provides officers with the ability to question suspects without warnings in these situations, and the suspects' answers will be fully admissible. The public safety exception has been held to permit interrogation about whether a person intended to kill himself in a bombing. *See, e.g., United States v. Khalil*, 214 F.3d 111, 121 (2d. Cir.), *cert. denied*, 531 U.S. 937 (2000). It has also been broadly interpreted to include questioning that might locate a victim or save a human life. *See, e.g., State v. Provost*, 490 N.W.2d 93, 96-97 (Minn. 1992) (questioning about location of burn victim), *cert. denied*, 507 U.S. 929 (1993); *State v. Kunkel*, 404 N.W.2d 69, 75-76 (Wis.) (questioning about missing child), *cert. denied*, 484 U.S. 929 (1987); *United States v. Padilla*, 819 F.2d 952, 961 (10th Cir. 1987) (questioning about whether someone inside a house was injured or armed). It is wholly unnecessary to permit officers to withhold warnings in ordinary

[14] Multiple-defendant prosecutions are, of course, commonplace. Prosecutors have available a variety of legitimate tools to help them assess the defendants' relative culpability, including policies of leniency for early and full cooperation.

circumstances, such as those at bench, simply so that law enforcement officers may withhold warnings in other and different circumstances already encompassed within the established public safety exception.

The conduct of the officers in this case is alarming. In our view, retreating from *Miranda* – or permitting officers to flout *Miranda*'s requirements in this fashion – would erode public confidence in law enforcement and be destructive of the rule of law. This Court should again affirm that *Miranda* imposes clear obligations upon police.

The public has strong, settled expectations about *Miranda*. As "part of our national culture" (*Dickerson*, 530 U.S. at 443), the warnings have come to embody the notions of constitutional restraint upon police. To hold that the warnings are optional would lead many Americans to believe that they had lost some of their most fundamental rights. This would undermine trust in the security of our basic legal protections. It would send a message that controlling crime is no longer compatible with informing suspects of their essential constitutional rights.

Perhaps even more destructive to our institutions would be a holding that police are required to administer *Miranda* warnings, but that courts will tolerate deliberate violations of that requirement. Law enforcement officers depend upon the cooperation of citizens in reporting crime and assisting in criminal investigations. Thus, for example, the current trend towards community-based policing seeks to foster mutual trust and cooperation between law enforcement and the public, responding to limitations of other models of policing.[15] Condoning police violation of

[15] *See, e.g.*, Bureau of Justice Assistance, U.S. Dep't of Justice, Understanding Community Policing: A Framework for Action 15-16 (1994) ("Establishing and maintaining mutual trust is the central goal of the first component of community policing . . . This trust will enable

(Continued on following page)

long-standing and well-understood constitutional requirements will be destructive of that trust and cooperation.

In *People v. Neal*, 72 P.3d 280 (Cal. 2003), the California Supreme Court unanimously found a defendant's statement to be involuntary and inadmissible for any purpose, where the interrogating officer deliberately questioned a defendant over his repeated invocations of the right to counsel. We agree with Justice Marvin Baxter, who wrote separately to emphasize why compliance with *Miranda* is critical:

> In a free society, we place the police in a position of unique power, but only on condition that they will do their best to uphold the law, and to enforce it nobly and fairly. Their ability to function effectively depends upon their credibility in that role. The community must trust that they do not operate by deliberately violating the very standards they are sworn to observe. When the police dishonor proper procedures, community respect for the police, and for the law itself, is undermined. . . .
>
> Police officers are human beings . . . Individual mistakes and overreaching will occur . . . But our community should never be subjected to cynical efforts by police agencies, or the supervisors they employ, to exploit perceived legal loopholes by encouraging deliberately improper interrogation tactics. Such practices tarnish the badge most officers respect and honor.

Neal, 72 P.3d at 298 (Baxter, J., joined by Chin and Moreno, JJ., concurring; citation omitted).

the police to gain greater access to valuable information from the community that could lead to the solution and prevention of crimes. . . . ").

The officer's purposeful violation of *Miranda* in this case likewise deserves this Court's condemnation. *Miranda* and its progeny impose clear and affirmative obligations upon law enforcement officers. The "two-stage" interrogation technique defies the holdings in *Miranda* and *Dickerson*, and this Court should not tolerate it.

II. THE COURT SHOULD EXCLUDE EVIDENCE DERIVED FROM AN UNREASONABLE FAILURE TO ADMINISTER *MIRANDA* WARNINGS

A. Exclusion Is Appropriate and Necessary to Ensure that Officers Provide *Miranda* Warnings

The process of custodial interrogation contains "inherently compelling pressures" that undermine a suspect's ability to assert the Fifth Amendment privilege. *Miranda*, 384 U.S. at 467; *see also Dickerson*, 530 U.S. at 435. *Miranda* set forth "concrete constitutional guidelines" for law enforcement officials and the courts (*Miranda*, 384 U.S. at 442), with the aim of protecting the privilege. The Constitution requires *Miranda*'s prescribed procedures or alternatives that are "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." *Miranda*, 384 U.S. at 467; *Dickerson*, 530 U.S. at 440 (quoting *Miranda*). In asking the Court to exclude a statement derived from an unreasonable failure to administer *Miranda* warnings, we do not seek to compel adherence to *Miranda*'s procedures for their own sake. Rather, *Miranda*'s safeguards are constitutionally necessary to protect the Fifth Amendment privilege, and the Court must take appropriate and necessary steps to ensure that these safeguards remain in place. Deterring police misconduct is a reason not to admit evidence derived from an unwarned statement, but the underlying provision that requires such exclusion is the Fifth Amendment itself.

Excluding a statement derived from deliberate misconduct is well within the mainstream of *Miranda* jurisprudence. In *Miranda*, the Court held that unless the prosecution established that police gave the pre-interrogation warnings and obtained a valid waiver, "no evidence obtained as a result of interrogation can be used." *Miranda*, 384 U.S. at 479. *Harris*, *Tucker* and *Elstad* provide exceptions, but all are premised upon the assumption that such use will not encourage impermissible behavior. Regrettably, that assumption no longer holds; officers have been trained not to comply with *Miranda*'s rules. The objectively unreasonable conduct of the officer here is sufficient to distinguish this interrogation from those other cases and supports a broader scope of exclusion. Where an officer acts in this fashion, the "deterrence rationale" applies with full force. "By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused." *Tucker*, 417 U.S. at 447.

Moreover, this Court has elaborated *Miranda*'s requirements when "appropriate and necessary" to assure the vitality of *Miranda*'s safeguards and thereby protect the Fifth Amendment privilege. *See Minnick v. Mississippi*, 498 U.S. 146, 153 (1990) (as "an appropriate and necessary application of the *Edwards v. Arizona* rule," police may not reinterrogate a suspect who has asked for counsel even if the suspect has actually met with a lawyer); *Edwards v. Arizona*, 451 U.S. 477, 485 (1981) (to "lend . . . substance" to an accused's right under *Miranda* to consult with counsel, officers may not reinterrogate a suspect in custody who has asked for an attorney).

Amici believe that the exclusion of a statement obtained through a "two-stage" interrogation is appropriate and necessary to encourage law enforcement officials to follow *Miranda*. The conduct of the officer in this case is quite troubling, and all the more so because the State

affirms that "there are already nationwide efforts to encourage officers" to question in this fashion. Pet., at 17. The State of Missouri further acknowledges the practice of questioning "outside *Miranda*," which means refusing to allow suspects to invoke their Fifth Amendment rights and terminate questioning (Pet., at 3), the very strategy employed in *Neal*.[16] We are aware of a number of recent judicial decisions in which law enforcement officers have questioned suspects in deliberate violation of *Miranda*.[17] The Court should adopt an exclusionary rule sufficient to lead law enforcement officers to comply with *Miranda*. In our judgment, *Miranda*'s warning requirement is unenforceable without the sanction of exclusion. Many officers will fail to perceive the warning requirement as an affirmative obligation unless it is backed with the sanction of exclusion.[18]

---

[16] *See* Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 Minn. L. Rev. 387, 447-50 (1999). Law enforcement officers have acknowledged this training in at least one other matter before this Court. *See* Petition for Writ of Certiorari, *Butts v. McNally*, No. 99-1594 (filed April 3, 2000), at 7, 10 (detectives had received state-certified training that it was permissible to continue questioning a suspect who had invoked the right to counsel). A number of "outside *Miranda*" training materials are collected in Charles D. Weisselberg, *Saving* Miranda, 84 Cornell L. Rev. 109, 133-37, 189-92 (1998) and *In the Stationhouse after* Dickerson, 99 Mich. L. Rev. 1121, 1135-54 (2001).

[17] *See, e.g., State v. Knapp*, 666 N.W.2d 881, 899 (Wis. 2003) (warnings not given); *United States v. Orso*, 266 F.3d 1030, 1032-33 (9th Cir.) (en banc) (warnings not given), *opns. respecting full court en banc reh'g*, 275 F.3d 1190 (9th Cir. 2001), *cert. denied*, 537 U.S. 828 (2002); *Neal*, *supra* (questioning over invocations); *People v. Bradford*, 929 P.2d 544, 556-61 (Cal.) (same), *cert. denied*, 522 U.S. 953 (1997).

[18] *See, e.g.*, Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. Rev. 24 (1980). Loewenthal interviewed ninety New York City police commanders about the obligations of the Fourth Amendment prior to the application of the exclusionary rule to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961).

(Continued on following page)

We also believe that the difficulties of disciplining officers and instilling norms within individual law enforcement agencies weigh in favor of a uniform rule, backed by the sanction of exclusion. These days, officers are not trained solely within their own agencies; it is commonplace for police to receive training from statewide or national organizations, prosecutors, or officials from other jurisdictions. If *Miranda*'s requirements become optional, to be applied at the discretion of the interrogating officer, many trainers will say so. It is tough sledding for any chief or supervisor to sustain internal disciplinary measures when respected law enforcement officials tell officers that what their chief or supervisor may disapprove is perfectly lawful under decisions of this Court.[19] This is particularly so because most police forces are unionized, either formally or through informal officer associations that provide legal counsel and seek arbitration or other administrative review of any effort to sanction individual officers.

Moreover, officer discipline may not be the most effective or appropriate "remedy," because the problem is a "top down" one, involving not out-of-control officers, but agencies that sponsor training that encourages interrogation in a manner inconsistent with the plain language of *Miranda*. An exclusionary rule appropriately places

---

Although this Court had declared in *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1948), that the Fourth Amendment's guarantee of privacy was "implicit in 'the concept of ordered liberty'" and applied to the states, officers did not understand that this holding imposed any legal obligations upon them because there was no sanction of exclusion. *See* Loewenthal, *supra*, at 29-30.

[19] In California, for example, "outside *Miranda*" training has come from highly respected sources, including the Commission on Peace Officer Standards and Training and other leading law enforcement agencies. *See* Weisselberg, 99 Mich. L. Rev. at 1136-40.

responsibility where it rests, which is upon senior law enforcement officials politically accountable for the behavior of individual officers in their charge.

Finally, this Court's decision in *Chavez v. Martinez* makes the sanction of exclusion all the more critical. No remedy other than exclusion is effective in enforcing the warning requirement. After *Chavez*, a civil rights lawsuit will be largely unavailable. And internal discipline seems highly unlikely where, as here, violating *Miranda* is departmental policy. *Chavez* puts the onus squarely on the remedy of exclusion. But to be effective in protecting the Fifth Amendment privilege and in preventing coercion, that remedy must provide a sufficient incentive for officers to give *Miranda* warnings.

B. A Rule Premised on Objective Good Faith Is Workable

The Court should exclude non-attenuated statements obtained by law enforcement officers who unreasonably fail to provide *Miranda* warnings. Such a rule would be based upon objective standards, not officers' or suspects' state of mind, and would be relatively easy to administer. An objective test of whether an officer's behavior was reasonable under *Miranda* would be no more difficult to administer than an objective test of whether a defendant was in custody: both look to external circumstances as a proxy for what was actually in the person's mind ("Am I intentionally violating Miranda?" "Am I free to leave?"). This exclusionary rule will reduce the incidence of involuntariness allegations and, at the same time, be easier for courts to apply than the totality-of-circumstances test for voluntariness.

An exclusionary rule that relies upon objective standards would be particularly manageable because this Court has placed a premium on clarity as it has articulated law enforcement's duties during a custodial interrogation. By

defining "custody" and "interrogation" objectively, instead of by reference to a suspect's own subjective beliefs (*see Stansbury v. California*, 511 U.S. 318, 323 (1994); *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)), the Court has afforded every officer the reasonable ability to determine when warnings are required. Further, the Court has maintained *Miranda*'s "bright lines" by rejecting whole categories of claims that might make an officer's responsibilities more difficult to determine. *See, e.g., Illinois v. Perkins*, 496 U.S. 292, 296-97 (1990) (warnings not required during contact with undercover officer); *Colorado v. Spring*, 479 U.S. 564, 575-77 (1987) (officers need not inform a suspect about the subject of the interrogation); *Moran v. Burbine*, 475 U.S. 412, 424-26 (1986) (officers need not advise a suspect that an attorney is trying to reach him); *Minnesota v. Murphy*, 465 U.S. 420, 433 (1984) (interview with probation officer is not custodial interrogation). Moreover, because the burden is on a suspect to assert the right to counsel unequivocally (*see Davis v. United States*, 512 U.S. 452, 459 (1994)), no well-meaning officer need fear misperceiving an accused's invocation of that right. Thus, as the United States previously pointed out, "*Miranda*'s core procedures are not difficult to administer. Federal agents do not find it difficult, in general, to read a suspect his rights and determine whether the suspect wishes to answer questions." Brief for the United States, *Dickerson*, *supra*, at 33.

The inquiry demanded by the exclusionary rule at bench would not fundamentally differ from that under *New York v. Quarles*, 467 U.S. 649 (1984). In *Quarles*, the Court established the "public safety exception" to *Miranda*'s warning requirement, and held that "the availability of the exception does not depend on the motivation of the individual officers involved." *Id.* at 655-56. Pre-interrogation warnings are not required when "police officers ask questions *reasonably prompted* by a concern for the public safety." *Id.* at 656. Where, as here, a law

enforcement officer does not administer pre-interrogation warnings, the trial court would examine all of the surrounding circumstances and determine – as with the public safety exception – whether the officer acted reasonably. This assessment would be no more intrusive, exotic or difficult than in *Quarles*.[20] A court's inquiry into the underlying circumstances would likely not extend beyond the routine, everyday facts necessary to determine custody and interrogation.

This case illustrates the ease of applying such an exclusionary rule. No objectively reasonable police officer could believe that this interrogation was permissible under *Miranda*. Respondent was in a police station under actual arrest; there could be no doubt that this was "custody." *See Stansbury*, 511 U.S. at 322. She was questioned about an arson fire, inquiries that the police should know "are reasonably likely to elicit an incriminating response," and thus amounting to interrogation. *Innis*, 446 U.S. at 301. Warnings were therefore required. No minimally trained officer could think otherwise. The objective facts of the arrest, interrogation and application of the "two-stage" interrogation technique, all combine to rob the State of its argument that an exclusionary rule will propel courts into the unhappy task of having to divine the subjective intent of individual interrogating officers. *See* Pet., at 9; Pet.Br., at 33-38.

Once a court finds that an officer's failure to provide warnings was, as here, objectively unreasonable, it must then assess whether a subsequent statement or other

[20] Similar inquiries into officers' objective good faith are also made under the qualified immunity doctrine. Judges ask whether a constitutional right is "clearly established." *See Hope v. Pelzer*, 536 U.S. 730, 739 (2002). The relevant question is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

evidence was derived from the violation and whether there is sufficient attenuation to purge the taint of the unlawful conduct. *See Wong Sun v. United States*, 371 U.S. 471, 486 (1963). Justice Jackson wrote for the Court in *United States v. Bayer*, 331 U.S. 532, 540-41 (1947) that a suspect who "can never get the cat back in the bag" is not necessarily "perpetually disabled" from making a voluntary confession, but reality must be accorded reasonable deference. In determining whether a subsequent statement is tainted by a previous illegality, this Court examines certain factors, including: the administration of *Miranda* warnings; the temporal proximity of the illegality and the subsequent statement; the presence of intervening circumstances; and the flagrancy of the misconduct. *See Brown v. Illinois*, 422 U.S. at 603-04.

These attenuating factors are no more difficult to apply to an unreasonable *Miranda* violation than in the ordinary Fourth Amendment context, though the first factor, the effect of *Miranda* warnings, merits further explication.

In the unlawful arrest context, *Miranda* warnings, standing alone, are usually insufficient to purge the taint of the Fourth Amendment violation. *See Kaupp v. Texas*, 123 S.Ct. 1843, 1846 (2003) (per curiam) (citing *Brown*). Similarly, we believe that when officers have engaged in a "two-stage" interrogation, a belated *Miranda* admonition should not ordinarily be treated as *per se* effective in rendering the subsequent statement "sufficiently a product of free will to break . . . the causal connection between the illegality and the confession." *Brown*, 422 U.S. at 603. The "reason why a person might make a second or third confession is simply that, having already confessed once or twice, he might think he has little to lose by repetition." *Darwin*, 391 U.S. at 350 (Harlan, J., concurring in part and dissenting in part). The standard warning given under *Miranda*, "you have the right *to remain* silent," is couched in entirely forward-looking terms that presume

silence by the suspect *to* that point. This makes good sense when the warning is delivered "*prior* to *any* questioning," but it is confusing when delivered mid-stream: after all, a suspect who has already given an unwarned confession cannot very well "remain" silent. Equally ambiguous is the phrase that often follows: "If you *give up* the right to *remain* silent. . . . " The problem is the suspect who does *not* realize that confessing anew "would *increase* his peril," when everyone else knows that just the opposite is true. *Darwin*, 391 U.S. at 351 (Harlan, J., concurring in part and dissenting in part).

Elstad held that a subsequent administration of *Miranda* warnings to a suspect who has made a first unwarned statement "*ordinarily* should suffice" to enable "a rational and intelligent choice whether to waive or invoke his rights." *Elstad*, 470 U.S. at 314. At the same time, however, the *Elstad* Court took pains to point out the absence of "deliberately coercive *or improper tactics* in obtaining the initial statement," and the Court indicated that under such circumstances a different rule of exclusion might be required. *Id*. *See also id*. at 309 (declining to hold that failure to give warnings "unaccompanied by any actual coercion *or other circumstances calculated to undermine the suspect's ability to exercise his free will*" taints a later warned statement). Here, by contrast, the record establishes circumstances that, viewed objectively, were calculated to undermine Respondent's free will. The officer engaged in a calculated, improper use of the first statement to elicit the second, by repeatedly referring to the first statement during his post-warnings interrogation. Under these circumstances, the administration of the forward-looking *Miranda* warnings should not be taken as *per se* effective in informing a suspect of the full extent of her rights, and in allowing her a voluntary choice between future speech or silence.

In accordance with the court below, we do not believe that a statement derived from an unreasonable failure to

provide *Miranda* warnings must always be excluded from evidence. Its admissibility should be assessed by traditional attenuation standards. We can envision some factors that, in combination, might particularly weigh in favor of a finding of attenuation, such as (a) a reasonable "cooling-off" period between first and second "stages"; (b) a separation between the two interrogations, meaning that post-warning interrogation should not include reference, quotation or coaching based upon the suspect's prior admission; and (c) advice to the suspect that what she said before cannot be used against her and that she is under no obligation to repeat or discuss it.[21]

We believe that the attenuation analysis is relatively straightforward to apply. The belated *Miranda* admonition did not inform Respondent that a decision to remain silent would have meaning. Only a cigarette break separated the two "stages" of the custodial interrogation, so the second statement was close in time to the first. There were no intervening factors. The officer's conduct was flagrant, as the continued interrogation of Respondent was essentially one of beseeching her to repeat the words of her prior, unwarned statement. This was altogether different from *Elstad;* the first "stage" of the interrogation successfully *created* the psychological and practical "disadvantages," and in the second "stage," the officer successfully *exploited*

[21] *Elstad* declined to establish a rule *requiring* officers to explain that a prior unwarned statement cannot be used against a suspect. *See id*., 470 U.S. at 316. The Court found such an explanation to be neither practicable nor necessary, noting that a breach of *Miranda* might not be identified until long after the interrogation had ended. *See id*. However, where an officer purposefully disobeys *Miranda*'s clear commands, there is no question but that the violation is known to the officer during the interrogation. Moreover, we suggest advice to the suspect about the prior statement not as a new mandatory requirement but, instead, as one factor among others that may be considered in favor of a finding of attenuation, if an officer has chosen to give such advice.

those disadvantages. For all of these reasons, we agree with the Missouri Supreme Court, which found that no intervening factors were sufficient to purge the taint of the *Miranda* violation. *See Seibert*, 93 S.W.3d at 705-07. Respondent's second statement should not have been admitted into evidence.

CONCLUSION

The judgment of the Missouri Supreme Court should be affirmed.

Respectfully submitted,

CHARLES D. WEISSELBERG
University of California
School of Law (Boalt Hall)

GEORGE A. CUMMING, JR.
Counsel of Record
MORGAN, LEWIS &
BOCKIUS LLP

STEPHEN J. SCHULHOFER
KIRSTEN D. LEVINGSTON
FREDERICK A.O. SCHWARZ, JR.
TOM GERETY
Brennan Center for Justice

Attorneys for *Amici Curiae*

San Francisco, California
October 2003

APPENDIX

Amici Curiae

Michael R. Bromwich
Inspector General, Department of Justice, 1994-1999; Associate Counsel, Office of Independent Counsel for Iran-Contra, 1987-1989; Assistant United States Attorney, Southern District of New York, 1983-1987.

Calvin 'Buck' Buchanan
United States Attorney, Northern District of Mississippi, 1997-2001; Assistant United States Attorney, Northern District of Mississippi, 1990-1997; United States Army, Army Judge Advocate, 1983-1990.

Veronica Coleman-Davis
United States Attorney, Western District of Tennessee, 1993-2001; Referee, Juvenile Court, 1989-1998; Assistant District Attorney, 30th Judicial District of Tennessee, 1982-1985.

Sharon L. Davies
Assistant United States Attorney, Southern District of New York, 1990-1995.

John Gibbons
Judge, United States Court of Appeals for the Third Circuit, 1970-1990 (Chief Judge, 1987-1989).

Eric H. Holder, Jr.
Deputy Attorney General of the United States, 1997-2000; United States Attorney, District of Columbia, 1993-1997; Associate Judge, Superior Court of the District of Columbia, 1988-1993; United States Department of Justice, Public Integrity Section, 1976-1988.

James E. Johnson
Under Secretary of the Treasury for Enforcement, 1998-2000; Assistant Secretary of the Treasury for Enforcement, 1996-1998; Assistant United States Attorney, Southern District of New York, 1990-1996.

Laurie L. Levenson
Assistant United States Attorney, Central District of California, 1981-1989 (Assistant Division Chief, Chief of Training, 1988-1989; Chief, Criminal Appeals, 1986-1988).

Robert Litt
Principal Associate Deputy Attorney General, 1997-1999; Deputy Assistant Attorney General, 1994-1997; Assistant United States Attorney, Southern District of New York, 1978-1984.

Rory K. Little
Special Assistant United States Attorney, Northern District of California, 1994-1998; Associate Deputy Attorney General, 1996-1997; Chief, Appellate Section, United States Attorney's Office, Northern District of California, 1989-1994; Trial Attorney, Organized Crime and Racketeering Strike Force, 1987-1989.

Nancy Northup
Assistant United States Attorney, Southern District of New York, 1989-1996 (Deputy Chief of Appeals, 1994-1996).

Andrea Sheridan Ordin
Chief Assistant Attorney General, State of California, 1983-1990; United States Attorney, Central District of California, 1977-1981; Assistant District Attorney, County of Los Angeles, 1975-1977.

James Orenstein
Associate Deputy Attorney General, 1999-2001; Attorney-Adviser, Office of Legal Counsel, 1998-1999; Special Attorney to the United States Attorney General, 1996-1998; Assistant United States Attorney, Eastern District of New York, 1990-2001 (Deputy Chief, Organized Crime and Racketeering Section, 1995-1999).

Samuel Pillsbury
Assistant United States Attorney, Central District of California, 1984-1986.

Stephen A. Saltzburg
Deputy Assistant Attorney General for the Criminal Division, United States Department of Justice, 1988-1989.

Michael G. Scheininger
Assistant United States Attorney, District of Columbia, 1972-1979.

William Sessions
Director, Federal Bureau of Investigation, 1987-1993; Judge, United States District Court, Western District of Texas, 1974-1987 (Chief Judge, 1980-1987); United States Attorney, Western District of Texas, 1971-1974.